

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-1364

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANNETTE BONEY,

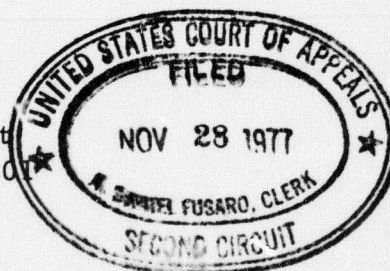
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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(6774A)

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PAGINATION AS IN ORIGINAL COPY

DOCKET ENTRIES

CRIMINAL DOCKET U.S. DISTRICT COURT

ETTY OFFENSE NO. 0719 JUDGE/MAGISTRATE Assigned U.S. 77CR 47

MAJOR OFFENSE NO. 207 1 Disposition: ANNETTE BONEY (LAST FIRST MIDDLE)

FELONY No. X District Office

Case Filed Mo. Day 1 27

U.S. MAG. CASE NO. 77 M 44

U.S. TITLE SECTION OFFENSES CHARGED

T-21:841(a)(1) Did knowingly and intentionally possess with intent to distribute and did distribute Methaqualone.

BAIL • RELEASE

AMT. ☐ Fugitive

Denied ☐ Set ☐ Pers. Recog.

\$50,000 PSA

Date 1-11-77

☐ Bail Not Made ☐ Collateral

☒ Status Changed (See Docket) ☐ 3rd Ptry Cpt ☐ Other

SENTENCE

Disposition of Charges

☒ Convicted ☐ On All Charges

☐ Acquitted ☐ On Lesser Offense(s)

☐ Dismissed ☐ WOP ☐ WP

☐ On Government Motion

II KEY DATES & INTERVALS

ARREST 1-11-77

INDICTMENT X 1.27.77

ARRAIGNMENT 2/4/77

TRIAL 5-2-77

5/2/77

5/4/77

5.2.77

SUPERSEDING COUNTS

MAGISTRATE

Search Warrant issued ☐ Return ☐

Summons* ☐ Return ☐

Arrest Warrant issued ☐ Return ☐

COMPLAINT 1-11-77 ASC/07E

OFFENSE (in Court)

INITIAL APPEARANCE DATE

DATE

INITIAL/NO

OUTCOME:

☐ DISMISSED

☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

conspire to distribute app. 25,000 dosage units of methaqualone a schedule II controlled substance. T-21 USC Section 846.

U.S. ATTORNEY

~~Jonathan M. Marks~~

Jonathan M. Marks

ATTORNEYS

~~John C. Rothblatt~~

John C. Rothblatt

232 West End Avenue

3330-Euclid-Avenue-Suite-213 New York NY 10023

Houston-Texas-77006 787 7002

EXCLUDABLE DELAY (a) (b) (c) (d)

1-11-77 Deft made bail. Deft. released. Receipt No. 090463.

1-21-77 Hearing waived.

1.27.77 Before Catoggio, V.- Indictment filed.

2/4/77 Before MISHLER, CH. J.- Case called Deft & Counsel present. Deft arraigned and enters a plea of not guilty. Bail conditions continued. - 3/7/77 for trial. 2/4/77 I (Limited to 3/7/77)

2/4/77 Notice of Appearance filed.

2-16-77 Letter filed dated 2-15-77 received from Chambers from atty Jon Rothblatt that trial has been adjd to May 2, 1977

4-1-77 Before Mishler, Ch J - case called - Govt to submit Order to have the deft examined by a psychiatrist. May 2, 1977 for trial.

5.2.77 Before U.S. Magistrate, Catoggio, V.- Superseding Indictment filed

over.....

DATE	DOCUMENT NO.	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				Total Days (d)	A
				Interval Section 8 (a)	End Date (b)	Code (c)	Days (d)		
5/2/77		Before Mishler, Ch J-case called-deft & counsel present motion to dismiss the indictment-argued and denied-motion to suppress the deft-argued & denied-deft arraigned and enters a plea of not guilty to superseding indictment (77CR 47S) same bail condition as in 77CR 47-trial ordered and begun on indictment 77 Cr 47 S-count 4 severed in the trial as to deft Boney jury-was selected & sworn-trial contd to 5/3/77.JLJ							
5/3/77		Before Mishler, Ch J-case called-deft & counsel present trial resumed-govt rests-motion by the deft for a judgement of acquittal is denied-trial contd to 5/4/77 TLJ.							
5-4-77		Before Mishler, Ch J - Case called - deft present with counsel Henry Rothblatt - trial resumed - motion by deft to dismiss count 3 as to venue is denied. Motion to dismiss counts 1 and 2 is denied. Deft renews motion for judgment of acquittal - denied. deft rests. At 12:55 PM the Jury retires for deliberations - At 4:05 PM Jury returns with a verdict of not guilty on counts 1 and 2 and guilty on count 3. Count 4 was severed at the beginning of the trial - Jury polled - Jury discharged - trial concluded. All Motions reserved until time of sentencing. Bail conditions contd and sentence adjd without date. rs.							
5-4-77		By Mishler, Ch J - Order of sustenance filed							
5.9.77		Zerox Copy of Letter filed to Henry Rothblatt from Judge Mishler dated 5.5.77 in re to deft's appealing.							
5-10-77		Letter filed received from Chambers from counsel Jon Rothblatt, Esq. adjourning post trial motions for one week, to and including May 18, 1977.							
5/18/77		Notice of motion ret 5/27/77 for an order dismissing counts three and four of the indictment pursuant to Rule 12 on the ground that the evidence before the grand jury was insufficient etcwith memo of law in support of post-trial motions filed.jlj							
5.27.77		Before Mishler, J.- Motion dismissint Counts 3 & 4 of the Indictment, etc. submitted. Decision reserved.							
6.23.77		Stenographer's Transcript dated May 2nd, 1977 filed.							
6.23.77		Stenographer's Transcript dated May 3rd, 1977 filed.							
6.23.77		Stenographer's Transcript dated May 4th, 1977 filed.							
7/6/77		Letter from Henry Rothblatt dated 7/5/77 filed							
7/7/77		Before Mishler, Ch J-case called-8/1/77 for trial-bail limits extended throughout the continental U.S as to deft First.jlj							
7/8/77		Sten's transcript dtd 5/2/77 filed.jlj							
7-20-77		By Mishler, Ch J - Writ of habeas corpus ad testificandum issued.							

continued.....

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

BONEY, Annette

77

47

2

Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
7.25.77	(Document No.) Notice of Motion for an order pursuant to the Speedy Trial Act of 1974 etc returnable 8.21.77 at 10:00 A.M. filed and forwarded to Chambers. (ret. 8-5-77)				gp
8-4-77	Letter filed recvd from Chambers dated 7-29-77 re waive of speedy trial form etc.				
8/1/77	Before Mishler, Ch J-motion for an order pursuant to the speedy trial act of 1974 adjd to 9/12/77.				
8/1/77	Before Mishler, Ch J-motion for dismissal of count 4 of superseding, bill of particulars adjd to 9/12/77. jlj				
8/1/77	Before Mishler, Ch J-adjd to 9/12/77. jlj				
8/2/77	Letter of Jon Rothblatt to Mishler, Ch J dtd 8/4/77 filed re confirmation that deft consented to adjd of trial to 9/12/77. jlj				
8-17-77	Govts Memo of Law filed in opposition to pre trial motions.				
8-18-77	Before Mishler, Ch J - case called - deft & counsel Henry Rothblatt present - deft is sentenced on count 3 to examination and report pursuant to 18:5010(e). Deft advised of right to appeal. Notice of appeal filed. Execution of sentence stayed pending appeal. All motions addressed to the verdict are denied. Bail continued.				
8-18-77	Judgment & commitment filed - certified copies to Marshal.				
8-18-77	Notice of appeal filed - docket entries and duplicate of notice mailed to the court of appeals.				
8.31.77	Uncertified Copy of Stenographer's Transcript dated May 2nd, 1977 filed.				g
8.31.77	Copy of Government's Memorandum of Law in Opposition to Post-Trial motions filed.				g
8.31.77	Record on Appeal certified and hand delivered to the Court of Appeals by Charles Murray of Rothblatt, Rothblatt, Seijas & Peskin.				g
9-2-77	Scheduling order filed that the record on appeal be docketed on or before 9-8-77.				g
9.12.77	Before Mishler, J.- Case Called. Trial reset for 9.26.77.				g
12.77	Before Mishler, J.- Case Called. Motion to dismiss Count 4 of Superseding indictment is denied. Motion for Bill of Particulars denied as indicated on the record.				g
12.77	Before Mishler, J.- Case Called. Motion for an Order pursuant to the Speedy Trial Act of 1974 etc. argued. Motion denied.				gp
4.77	Acknowledgment filed received from the Court of Appeals for the Record on Appeal.				g
16-7	Before MISHLER, CH.J-Case called. Deft Boney present with counsel Trial ordered & begun as to Count 4 only. Jury selected & sworn. Trial cont'd to 9-27-77. mg				
9-27-77	Before MISHLER, CJ.-Case called. Deft present w th counsel. Trial resumed. Govt rests. Motion by deft to dismiss the indictment is denied. Deft rests. Trial				

AO 256A

Interval
(per Section II)

Start Date
End Date

Ltr. To
Code Dr

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
9-28-77	cont'd to 9-28-77. mg Before MISHLER, CH J-Case called. Deft present with counsel. Trial resumed. Both sides rest. Deft renews motion to dismiss. Motion denied. Jury retires to deliberate. At 6:30 jury returned and asked to suspend for the day and return on 9-29-77 for further deliberations. Trial cont'd to 9-29-77. mg				
9-29-77	By MISHLER, CHJ-Order of sustenance filed. mg				
9-29-77	By MISHLER, CH,J-Order of sustenance filed. mg				
9-29-77	Before MISHLER, CH,J-Case called. Deft present with counsel. Trial resumed. At 9:35 jury retired for further deliberations. At 11:40 am the jury returned and rendered a verdict of guilty on Count 4 as to deft Boney. Jury polled and returned for further deliberations as to deft First. Motion by deft to set aside verdict is denied. Deft Boney sentenced to examination and report pursuant to 18 USC 4205(c) on Count 4. Execution of sentence stayed pending appeal. Bail conditions continued as to deft Boney. By MISHLER, J-JUDGMENT & COMMITMENT FILED. Copy to USM.				
9-29-77	NOTICE OF APPEAL FILED. Copy with duplicate docket entries to C of A. mg				
9-29-77	Stenograhper's transcript dtd 9-26-77 and 9-27-77 filed- mg				
9-29-77	By MISHLER, CH,J-Order of sustenance filed. mg				
9-29-77	XX mg				

SUPERSEDING INDICTMENT
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

ANNETTE BONEY and
STUART FIRST,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 17th day of November 1976, within the Eastern District of New York, the defendant ANNETTE BONEY did knowingly and intentionally possess with intent to distribute approximately 60,000 tablets of Methaqualone, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT TWO

On or about the 17th day of November 1976, within the Eastern District of New York, the defendant ANNETTE BONEY did knowingly and intentionally distribute approximately 60,000 tablets of Methaqualone, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT THREE

On or about the 21st day of December 1976, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant ANNETTE BONEY did knowingly and intentionally possess with

S U P E R S E D I N G
I N D I C T M E N T

Cr. No. 77 CR 47(S)
(T. 21, U.S.C. §§841(a)(1)
and 846)

intent to distribute approximately 20 kilograms of Methaqualone, a Schedule II controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about and between October 22, 1976 and January 10, 1977, within the Eastern District of New York and elsewhere, the defendants ANNETTE BONEY and STUART FIRST did knowingly and intentionally combine, conspire, confederate and agree together and with Michael Cantor, named herein as a co-conspirator but not as a defendant, and others to possess with intent to distribute and to distribute approximately 129,300 tablets of methaqualone, a Schedule II controlled substance, in violation of Section 841(a)(1) of Title 21, United States Code. (Title 21, United States Code, Section 846).

A TRUE BILL.

FOREMAN.


DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1 THE COURT: Let me hear about the other case
2 that's before me.

3 (Whereupon, a short recess was had.)

4 (After recess.)

5 THE COURT: How is the Government prejudiced by
6 not including the conspiracy count in the indictment.

7 MR. MARKS: In only one respect. One of the
8 counts charges the defendant with possessing these
9 drugs in the Eastern District. Our theory is even though
10 she was not in the district, she was in Texas, that
11 she had constructive possession of those pills when
12 she had them shipped up here by air freight and when
13 they arrived at Kennedy Airport, but just so there is
14 no question about that, about venue, we felt that it
15 was wise --

16 THE COURT: You mean as to one of the counts.

17 MR. MARKS: Yes, your Honor.

18 THE COURT: Who possessed it?

19 MR. MARKS: The Government's proof will show the
20 defendant.

21 THE COURT: Who possessed it here in the
22 Eastern District? Who physically possessed it.

23 MR. MARKS: The agents picked it up at the
24 airport.

25 THE COURT: That's a novel theory that she

1 constructively possessed while they had actual
2 possession of it. Why do you want to avoid that
3 issue, it's a very interesting one.

4 MR. MARKS: We would like to have a conviction
5 that holds up on appeal.

6 THE COURT: You may not get it even in this
7 court.

8 MR. MARKS: That's why we have a conspiracy
9 count, Judge. I am talking now about Count 3 in the
10 indictment.

11 THE COURT: I don't think that's a good reason.
12 I think the answer to that is if it's dismissed by me
13 or it gets a not guilty verdict I don't know whether
14 it will be double jeopardy to indict her for
15 conspiracy. At any rate if the defendant is ready
16 I'll direct the Government to get ready. I will not
17 adjourn this case if the defendant is ready.

18 MR. ROTHBLATT: I'm ready on the original
19 indictment.

20 THE COURT: That's what I mean.

21 MR. MARKS: The Government will be ready if
22 your Honor so directs.

23 THE COURT: Yes. Martin, 40 jurors.

24 MR. ROTHBLATT: Can I make some pretrial motions?

25 THE COURT: I don't know what the pretrial

1 motions are.

2 MR. ROTHBLATT: Motions directed to the
3 indictment that have come up.

4 THE COURT: Any written motions here?

5 MR. ROTHBLATT: We did not make any written
6 motions. These are all based upon the discovery
7 material that was just furnished to us, so obviously
8 we are unable to make it based upon --

9 THE COURT: You are going to move to dismiss
10 the indictment based on discovery material. All
11 right, I'll hear them.

12 MR. MARKS: Just so the record is clear, Rule 16
13 material was turned over to Mr. Rothblatt's office
14 well in advance of trial, the 3500 material has been
15 turned over to him, much was turned over last week.
16 There were a few remaining pieces that were turned over
17 this morning.

18 MR. ROTHBLATT: It's based principally on the
19 3500 Material, a statement in the Grand Jury testimony,
20 that's all it's based on. We didn't get that until
21 last week. We couldn't move with respect to it until
22 we got it.

23 THE COURT: All right.

24 MR. ROTHBLATT: Your Honor, we move to dismiss
25 the entire indictment for insufficiency of evidence

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MR. ROTHBLATT: The defendant moves for a directed verdict of acquittal.

THE COURT: Motion denied. That's the same motion I would have made.

MR. ROTHBLATT: I wanted to make some argument tomorrow.

THE COURT: I won't take argument. I don't need argument on that. It's as routine as any motion could be and you're not going to make it sound that it's unusual by any speeches.

MR. ROTHBLATT: We don't have to have this on the record.

THE COURT: Put everything on the record.

MR. ROTHBLATT: Judge, all I say is that in the course of my professional responsibility, I feel the Court ought to listen to my legal argument and give me a little time to think about it.

THE COURT: Only when necessary. There is no need to take the time of the Court, just because a lawyer would like to talk.

MR. ROTHBLATT: Two or three minutes of the Court's time --

THE COURT: Too much is useless. An hour if you need it is maybe sufficient. But two or three minutes

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is a waste.

MR. ROTHBLATT: Isn't a lawyer the best judge --

THE COURT: On questions of law, whether the Government has made out a case?

MR. ROTHBLATT: Don't you think my analysis might be helpful to the Court?

THE COURT: Do you have a memorandum on it?

MR. ROTHBLATT: That's what I wanted to check over tonight. I can't do it --

THE COURT: I just asked a rhetorical question. All right. I wouldn't hear it anyway.

MR. ROTHBLATT: That's all I wanted to accomplish.

THE COURT: I told you there was only one legal question that I had in mind here, and maybe two. And the Government was the one that pointed it out and the only question, I think it's Count Three, whether she could have been in possession of the qualudes while she was in Texas and the qualudes were at John F. Kennedy Airport. The Government pointed out the problem out there and I recognized that problem and I decided to let it go to the jury, and then when it's all over, I will have to look at it because it may very well be that when she sent it from Texas, up until the time it was actually delivered or received, -- she was a

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constructive possession. I'm not going to hear a
lot drivel on it.

MR. ROTHBLATT: I want to cite some cases on it.
That's not drivel.

THE COURT: Cite 1,000.

MR. ROTHBLATT: Judge, my notes are too
disorganized.

THE COURT: I'll wait. For that I'll wait. I
want to see it and hear it now. Give me the case.

MR. ROTHBLATT: Your Honor is putting me to the
test of finding --

THE COURT: That's right. You know why I'm
doing it.

MR. ROTHBLATT: If your Honor will be patient,
I will find it.

THE COURT: I will wait 15 minutes for that.

MR. ROTHBLATT: It's not necessary, Judge. If
you would just give me three minutes, if you -- either
I have it or don't have it. Either I have it or I don't
have it.

THE COURT: You're an experienced lawyer,
Mr. Rothblatt. I want you to know I have been sitting
here almost 17 years.

MR. ROTHBLATT: Judge, nobody questions your

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52

professional qualifications. I realize the judge I'm trying the case before. It's one of my responsibilities to know the judge I am trying before.

THE COURT: That's right.

MR. ROTHBLATT: United States against Leong, 536 Fed. 2d, 939.

THE COURT: Do you have the case?

MR. ROTHBLATT: I have it in my notes.

THE COURT: What does the case say?

MR. ROTHBLATT: You want the principles, your Honor?

THE COURT: Yes, sir. What circuit?

MR. ROTHBLATT: Second Circuit.

THE COURT: What year?

MR. ROTHBLATT: 1976.

THE COURT: What does it say?

MR. ROTHBLATT: The Government must prove as alleged that the illegal possession occurred -- this is the principle. I'm not giving the quote -- in the district in which the crime is alleged, it must be proven within the Eastern District of New York.

THE COURT: That doesn't say a single thing on the argument that you make. What you're saying is she was not in constructive possession when it was in the

hands of the authorities or when it arrived at Kennedy. Give me a case on that. Of course possession, you have to prove possession in a district in order to establish venue.

MR. ROTHBLATT: You mean on that issue?

THE COURT: I knew that on the day after I got out of law school.

MR. ROTHBLATT: I thought that was the question you were putting to me?

THE COURT: You're arguing. The Government indicated to me it may be that they can't prove possession within this district because it was shipped from Texas and it arrived here.

MR. ROTHBLATT: That's the Leong Case.

THE COURT: What were the facts of the Leong Case?

MR. ROTHBLATT: I don't have it offhand. I don't want to misstate.

THE COURT: Do you have any cases on it?

MR. MARKS: Oh, no, your Honor, I don't. I will have cases on it tomorrow morning.

With respect to the requests to charge, there is one matter I would like to clear up. It bears on what requests I'm going to make. Mr. Rothblatt and I have stipulated as to the unavailability of certain witnesses.

1 MR. ROTHBLATT: Your Honor, we contend, and I
2 want to say it now, the evidence has established that
3 if there was any possession by the accused, it took
4 place in the State of Texas and not in New York.

5 THE COURT: You are only talking about Count
6 3 now, right?

7 MR. ROTHBLATT: That's correct. Counts 1 and
8 2 are different propositions entirely.

9 THE COURT: Go ahead.

10 MR. ROTHBLATT: And the distribution, if there
11 was a distribution, was completed, if and when the
12 defendant placed the package, delivered the package to
13 Emery Air Freight in Texas. That was the end of her
14 possession.

15 THE COURT: All right, motion denied. Go on to
16 the next point, Mr. Rothblatt.

17 MR. ROTHBLATT: So there can be no --

18 THE COURT: I deny your motion, even if you
19 did make it at the beginning. I don't believe you did
20 and I am going back to the hearing I had, and I'd like
21 Mr. Legendre to bring up the discussion I had with
22 Mr. Rothblatt. Next point, Mr. Rothblatt.

23 MR. ROTHBLATT: So that --

24 THE COURT: Next point.

25 MR. ROTHBLATT: I have covered it now, your Honor,

1 and we do not waive and have no intention of waiving
2 the venue question here in the Eastern District.

3 THE COURT: I say you did. That's another point
4 you raise.

5 MR. ROTHBLATT: May I further point out to your
6 Honor --

7 THE COURT: I don't want to hear any more argu-
8 ment on the venue. I said no speeches. Just the
9 grounds.

10 MR. ROTHBLATT: I am not discussing venue.
11 I want to remind your Honor that the indictment, under
12 which this defendant is being tried, was a superseding
13 indictment, handed down on the morning that this case
14 commenced to trial. I don't know how the defendant could
15 have moved anymore diligently than she did, considering
16 the indictment that is being tried in this case, which
17 was handed down when the case commenced.

18 THE COURT: I heard all of that. Next point.

19 MR. ROTHBLATT: I would like to be heard on the
20 first two counts if I may.

21 THE COURT: Just state the grounds.

22 MR. ROTHBLATT: All right.

23 Count one, your Honor, is a lesser included
24 offense, included in the distribution count in the
25 second count.

1
2 to distribute the same.

3 Count two, that on or about November 17th,
4 1976, the accused distributed -- and in this case
5 sold them to Mr. Michael Cantor -- distributed
6 approximately sixty thousand tablets of methaqualone
7 a schedule two narcotic controlled substance and
8 that said distribution was done knowingly and
9 intentionally.

10 Count three, that on or about the 21st day
11 of December, 1976, the accused possessed approximately
12 twenty kilograms of methaqualone, a schedule two
13 narcotic controlled substance; and two, that such
14 possession was knowing and intentional and with
15 intent to distribute.

16 Now, we have some definitions.

17 The law recognizes two types of possession.
18 One is actual possession and the other is construct-
19 ive possession.

20 A person who knowingly has direct physical
21 control over a thing at a given time is then in
22 actual possession of it. I am now in actual possess-
23 ion of my eyeglasses. I hold them in my hand. I
24 have direct physical control over my glasses.

25 A person, although not in actual possession,

1
2 knowingly has the power and intent at a given
3 time to exercise dominion or control over a thing,
4 either directly or through another person or persons,
5 is then in constructive possession of it.

6 I will read that again because there is a
7 serious question as to whether the defendant had
8 actual possession, if you believe the evidence in
9 the case. It's an issue raised by the defendant.

10 I'm sorry. As to whether she had possession
11 of the 25,300 pills that the Government claims
12 was methaqualone, in New York. Because the
13 Government's theory is that the possession was in
14 New York and the possession over those pills was
15 constructive possession.

16 The Government doesn't claim that the
17 possession of those pills in New York was actual
18 possession.

19 I will read that again. A person although
20 who is not in actual possession, knowingly has
21 both the power and the intention at a given time to
22 exercise dominion or control over a thing, either
23 directly or through another person or persons it
24 is then constructive possession. The law recognizes
25 also that possession may be sole or joint. One
may have possession, actual, while the other may have

1
2 constructive possession.

3 If you find that the element of possession,
4 as that term is used in these instructions is present
5 and you find that beyond a reasonable doubt, then
6 you shall have found that one of the elements in the
7 crime charged or a part of one of the elements of
8 the crime charged has been proven.

9 One having title to and in actual possession
10 of merchandise who thereafter ships the merchandise
11 by carrier of his or her own choosing, by bill of
12 lading to a purchaser, with instructions to the
13 purchaser as to how and in what manner to receive
14 the merchandise, retains constructive possession
15 of the merchandise until delivery.

16 So, in this case, if the Government proves
17 beyond a reasonable doubt that the accused had
18 actual possession of the methaqualone and that
19 sometime on or about December 17th, 1976, that
20 she shipped the quaaludes via Emery Airfreight,
21 and that she chose Emery Airfreight as the carrier
22 and addressed the same to Michael Cantor, with
23 instructions as to how and where to pick up the
24 methaqualone, I charge you if you find all that,
25 then as a matter of law, the defendant retained

1
2 constructive possession, even though she had
3 surrendered actual possession.

4 An act is done knowingly if done voluntarily
5 unintentionally and not because of mistake or
6 accident or negligence or gross negligence or other
7 innocent reason. The purpose of adding knowingly
8 was to insure that no one would be convicted for an
9 act done because of mistake or accident or innocent
10 reason.

11 An act is done intentionally if done
12 deliberately and the Government must prove, under
13 the elements in this case and under each count that
14 the possession was knowing. In other words, the
15 defendant was aware that she possessed the methaqua-
16 lone at the time and place charged and further
17 that she possessed it with specific intent to
18 sell it, negating any possession for her own use.

19 Now, something was said in the summation
20 about depriving the defendant of her liberty. I
21 want you to know that that's not your decision at
22 all. You determine the guilt or innocence of the
23 defendant in this case. If you find the defendant
24 guilty, then the Court will make that determination.
25 So, don't be bothered or concerned about

1 THE COURT: Denied.

2 MR. ROTHBLATT: Now, your Honor --

3 THE COURT: In the event of conviction,
4 I wish you would present that to the Court of
5 Appeals and see how they react to it.

6 MR. ROTHBLATT: Judge, we don't know unless
7 we try.

8 THE COURT: That's right.

9 MR. ROTHBLATT: I respectfully except to your
10 Honor's charge dealing with possession as your
11 Honor instructed the jury and specifically
12 where your Honor defined constructive possession,
13 in the language you did, where you spoke about
14 directly -- I'm sorry. Indirect, either directly
15 or indirectly or through another person and
16 your Honor proceeded to define constructive possess-
17 ion in the language that you did.

18 THE COURT: Yes?

19 MR. ROTHBLATT: And I would respectfully
20 request that your Honor instruct the jury, on
21 the definition of constructive possession as set
22 forth in our request number five --

23 THE COURT: I decline to so charge.
24 It happens to come almost directly from Devitt
25 and Blackman. What I added to it was my own ver-

1 sion of what constructive possession would mean
2 in the context of the evidence of this case.

3 MR. ROTHBLATT: Yes.

4 THE COURT: There I could be all wrong.

5 MR. ROTHBLATT: To that extent, that's
6 specifically what I am excepting to your Honor's
7 charge, that that portion was in my judgment--

8 THE COURT: Which portion?

9 MR. ROTHBLATT: Where you went in to describe
10 --

11 THE COURT: I said under certain conditions
12 they could find constructive possession if she had
13 actual possession, if she mailed it. If she
14 chose the carrier. If she chose Michael Cantor
15 to receive it, then she was in constructive
16 possession. That's the best exception you have
17 taken so far.

18 MR. ROTHBLATT: I would ask that the jury
19 be instructed in the language that we have set
20 forth. I have no further requests beyond what
21 I have already indicated.

22 THE COURT: All right, please call the
23 jury in. U

24 (Time noted 12:47 P.M.)

25 THE COURT: There was an error in the

revealed Michael Cantor's home telephone number
and the report also lists his working number.

Is there any doubt whatsoever about Michael
Cantor's testimony that he sold five thousand
quaaludes to Howard Podell?

Howard Podell admits it. Is there any testi-
mony that suggests that the five thousand quaaludes
that Howard Podell bought from Michael Cantor were
anything but methaqualone? Of course, they were
methaqualone. We know that because the laboratory
analysis shows that they were. So, where is the
double talk?

In addition, you recall that Goldmantesti-
fied that he received four thousand of those pills
and that he sold them all. He bought them for
\$2.10 and sold them for about \$2.35 a piece and
he said all of his customers were satisfied.
He didn't get one return. If they were something
other than what they were supposed to be, methaqua-
lone, don't you think some of his customers would
have complained? There is no doubt that the
methaqualone which is mentioned in Counts one and
two was indeed methaqualone.

Now, with respect to the third count, that

1
2 is the 25 6, that is referred to on the tape, I
3 would like to play that tape for you. This is
4 Government's exhibit three in evidence.

5 (Tape being played.)

6 MR. MARKS: Is there any doubt that Annette
7 Boney has sent that package to Kennedy Airport in
8 the Eastern District of New York and his Honor will
9 charge you that in order to possess something you
10 don't have to have it in your physical possession.
11 There is something called constructive possession.
12 If you were, for example, to lend your car to some-
13 body else, it doesn't mean the car is out of your
14 possession --

15 MR. ROTHEBLATT: Your Honor, I submit the
16 analogy is not a proper statement of the law.

17 THE COURT: May I have that over again?

18 (Thereupon, the court reporter read back the
19 aforementioned colloquy.)

20 THE COURT: I will allow that analogy.

21 MR. MARKS: In this case, it is, appearing
22 from this tape, from the tape itself, her voice
23 that she arranged to send that package through
24 Emery Airfreight to Kennedy and she knew perfectly
25 well that it was going to end up in the Eastern

1
2 District of New York because that's where she sent
3 it to, Raffique, 1407 Broadway, attention M. Cantor,
4 and she said, "Pick it up at Kennedy." That's what
5 she told him to do.

6 Finally, with respect to Mr. Cantor himself,
7 Mr. Rothblatt's characterizing him as a creature,
8 he certainly isn't a man of high moral character.
9 In addition to being a sweater salesman was also a
10 drug dealer, and he was a married man having an
11 affair with another woman and perhaps for a pretty
12 sleazy reason. He is not a man whom we look up to
13 for moral guidance. That's for sure.

14 Now, wouldn't it be nice if in cases such
15 as this, drug cases, we could call people like a
16 Chief Justice of the United States, people whom we
17 look up to, people whom we respect, to testify about
18 drug transactions. Certainly Mr. Rothblatt cannot
19 make such arguments about those people. He
20 couldn't stand here and yell and call them creatures
21 because these are men of high moral standing.
22 Unfortunately, people of high moral standing do
23 not engage in drug dealing. They do not have
24 personal knowledge of drug transactions and that's
25 why in a case like this the Government has to call

REQUEST NO. 4 -- Elements of Possession With Intent to Distribute

The essential elements of this offense, each of which the government must prove beyond a reasonable doubt, are:

FIRST: That on or about the date set forth in the indictment, the defendant ANNETTE BONEY possessed the controlled substance methaqualone within the Eastern District of New York;

SECOND: That the defendant did so possess the controlled substance methaqualone with a specific intent to distribute it; and

THIRD: That the defendant did so knowingly and intentionally.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crimes charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackman, Federal Jury Practice and Instructions, Section 58.14 (1977).

REQUEST NO. 5 -- Definition of Possession

The law recognizes two kinds of possession: actual possession and constructive possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person is in constructive possession of a thing when, although not in actual possession, he knowingly, at a given time, has both the power and intention to exercise dominion and control over it.

Constructive possession is not established merely because a person has knowledge of the presence or location of a thing, or because he has an association with other individuals who possess or control the thing. Rather, in order to have constructive possession, a person must, at the time of constructive possession, be in a position himself to assure delivery of the thing, or control the means of transferring it, or set the price for its sale.

That the defendant ANNETTE BONEY may have possessed the substance methaqualone--either actually or constructively--at some time other than the occasions charged in the indictment, or in some place other than the Eastern District of New York, does not prove the element of possession for the offenses charged in this case. In this regard, it is to be emphasized that the

REQUEST NO. 5 (cont'd)

defendant is on trial only for the acts and conduct specifically alleged in the indictment, and no others.

Devitt & Blackman, supra, Section 16.07, 11.04
United States v. Jones, 308 F.2d 26, 30 (2d Cir. 1962) (en banc)
United States v. Steward, 451 F.2d 1203, 1207 (2d Cir. 1971)

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2/22/77
9/27/77. 2

L L O Y D N. C L I F T O N, called as a witness, on behalf
of the Government, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARKS:

Q What is your occupation, sir?

A I am a special agent with the Drug Enforcement
Administration.

Q How long have you been a special agent?

A Approximately 7-1/2 years.

Q What office are you assigned to, sir?

A Dallas, Texas Office.

Q Were you working on August 18, 1977?

A Yes, sir.

Q Can you tell us what you did on that day?

A We served a search warrant at 2533 Farrington
(Phonetic) Dallas, Texas, on a clandestine laboratory.

Q Did you go into the laboratory, sir?

A Yes, sir.

Q What did you find?

A We found a laboratory there, various precursory
type chemicals, equipment, miscellaneous powders used to make
tablets, machinery, glass ware, etc.

Q Was this the first clandestine laboratory you've

21

2 ever been in?

3 A No, sir.

4 Q How many such laboratories have you been in?

5 A Oh, four or five.

6 Q How did this compare in size to the other ones?

7 A It was the largest.

8 MR. ROSENTHAL: Your Honor, I would object to
9 this testimony and to strike it out, unless the Govern-
10 ment can establish that this laboratory was in operation
11 prior to December 21st or December 29th of 1976--

12 THE COURT: The motion to strike is denied.

13 I'll charge the jury that if it's established
14 that this laboratory was in operation in August of
15 1977, they may infer, if the inference is favorable,
16 based on good common sense and experience and based
17 on all the circumstances of the case, that it was in
18 operation prior to the 20th of December, 1976.

19 Now, some inferences are strong and some
20 inferences are weak.

21 I always give an example of this building. If
22 you were to make a fact finding as to whether or not
23 this building was standing and erect prior to this date
24 and the question was whether it was standing and erected
25 yesterday, the inference from the established fact that

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it's in existence today would be very strong that it was here yesterday; that it was here last week is still very strong, but it was here last year is still strong, but it becomes weaker; five years ago, ten years ago, fifteen years ago, because of the length of time the inference may become weaker and there may come a time when you'll refuse to infer from an established fact of existence on one day that it existed on a prior day. So, would this factory if the Government proves that this is a factory that manufactured quaaludes in August of 1977, you may find that it's not enough to prove that it was in existence December 20th, 1976, then just disregard his testimony, but if you find from that testimony and all the other circumstances of the case that it's reasonable to infer that it was existing and in operation on December 20th, 1976, that's for you to make, that's a determination for the jury. That's why you're here.

Use your good common sense and experience.

THE CLERK: Seven photos marked Government's exhibit 7 through 7F inclusive for identification; two photographs marked Government's exhibit 8 and 8A for identification.

BY MR. MARKS:

§ 4 1

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Clifton-direct

2 Q Mr. Clifton, can you take a look at Government's
3 exhibit 7 through 7F, marked for identification and tell us
4 if these are a true and accurate representations of the outside
5 and of the interior of the clandestine laboratory that you
6 just described?

7 A Yes.

8 MR. MARKS: I would offer these.

9 THE COURT: Show them to counsel.

10 Except for the objection which you previously
11 made, do you have any others?

12 MR. ROSENTHAL: No.

13 THE COURT: Those objections are preserved and
14 the exhibits may be marked in evidence.

15 THE CLERK: Government's exhibit 7 through 7F
16 previously marked for identification, now marked in
17 evidence.

18 BY MR. MARKS:

19 Q Can you tell us, please, what each of these
20 photographs depicts?

21 A Number 7 depicts a sign that was placed at the
22 front door reading, "Environmental testing."

23 Number 7A depicts a side view of the building that
24 occupied the laboratory.

25 Q Was there anything else in the building besides

5 1 32

2 the laboratory?

3 A No, sir.

4 7B depicts a 16 station tableting machine made by
5 Stable Stokes Corporation (Phonetic) and a tableting machine.

6 Q What is the tableting machine?

7 A A tableting machine is a machine that compresses
8 powder into tablet form.

9 Q Number 7C depicts 7 paper barrels, some middle
10 rakes with screen, other boxes and containers.

11 7D depicts a room that contained five 200 leader
12 reaction blasts.

13 7E depicts, I believe it's a 2,000 leader reactor.

14 Q About how tall is that reactor?

15 A Standing as it is on the side here, it's
16 approximately six foot from the floor.

17 Number 7F is another shot of the glass reactors.

18 Q Now, I show you 8 and 8A, can you tell us what
19 these are?

20 A Yes, these are VEA Evidence Envelopes containing
21 middle punches that are used in the 16th station tableting
22 machine to compress tablets and these are the top punchers
23 that depict a single score which would make the line on the
24 pill.

25 Q Can you just explain that a little bit more?

Clifton-direct

Q 1
2 A Ok. There are two sets of punches and there's
3 a dye and in the machine, as it rotates, they work on a cam
4 and the bottom punch and the top punch meet in the dye,
5 which is a round cylinder and makes an impression of powder
6 that has been poured into there. These particular punches
7 in these photographs are the longer punches, which sit in the
8 top row and go around the machine and show a line on there
9 on the punching surface itself, which would make a line on
10 a pill.

11 Q That's the scoring like on --

12 A Yes.

13 Q Is there anything written on those punches?

14 A Not on these two photographs.

15 Q What about on the punches themselves?

16 A Well, there's some other photographs that show
17 the other sets of punches that depict it.

18 THE COURT: Did you see these punches when they
19 were photographed?

20 THE WITNESS: Yes, sir.

21 THE COURT: So those pictures substantially
22 represent the punches as you saw them?

23 THE WITNESS: Sir.

24 THE COURT: Was that in August, 1977?

25 THE WITNESS: No, sir.

Clifton-direct

These were -- when these punches were found, they were in a wooden box, which I also have a photograph of, and then I placed them into that -- those heat sealed envelopes myself.

MR. MARKS: Have these four photographs marked, please.

THE CLERK: Four photographs marked Government's exhibit 8B, 8C, 8D and 8E for identification.

BY MR. MARKS:

Q Can you take a look at the exhibits that have just been marked for identification and tell us what these are?

A Number 8B contains a set of steel punches also shorter than the previous ones I just spoke of. These are the lower punches and they depict an engraving on the end of the punch, Rorer 714.

Q How is Rorer spelled?

A R-O-R-E-R.

And these punches also show a small doling in the side of the punch, which indicates if this was the first punch made up for the machine back in September and October of 76,

--

Q Number 8E --

THE COURT: I don't quite understand how you can fix the date of making up the punches of September

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and October, 1976?

3

THE WITNESS: We've made contact with the Graver--
with the engraver, your Honor.

5

MR. ROSENTHAL: I object, your Honor.

6

MR. ROTHBLATT: We're getting into a hearsay
area, your Honor.

7

8

THE COURT: The jury is excused.

9

(Whereupon, the jury leaves the courtroom.)

10

(Whereupon, the following occurred out of the
presence of the jury:)

11

12

THE COURT: Tell me how you learned that the
punches were made at in September or October, 1976?

13

14

MR. ROTHBLATT: Judge, you're dropping your voice--

15

THE COURT: Will you repeat it --

16

MR. ROTHBLATT: No, your Honor --

17

THE COURT: I haven't said it before, but mind
you, we have four people at the counsel table; the
other three haven't objected and it may be your hearing.

19

20

MR. ROTHBLATT: I hope not.

21

THE COURT: Maybe what you ought to do is take
a seat closer to the witness, maybe there or turn around
or get closer to the witness.

23

24

MR. ROTHBLATT: Judge, as we get older your hearing--

25

THE COURT: Nobody realizes that more than I.

Clifton-direct

I don't complain about it being the witness' fault.

I place the fault where it belongs.

MR. ROTHBLATT: I can't change my physical condition.

As I get older --

THE COURT: I have an advantage. I have a lessening of hearing acuity on my right ear, and that's what is usually towards the lawyers. My left ear is just fine. I hear everything the witnesses say.

MR. ROTHBLATT: We're at a distinct disadvantage--

THE COURT: I'm at an advantage. I wouldn't say you're at a disadvantage.

How did you learn that the punches were made in September, October of 1976?

THE WITNESS: Ok, during May of 1977, we were contacted by an engraver that had been approached by the subjects that were running the clandestine laboratory in Dallas and we went out and personally interviewed him, and through this interview he showed us the sample of what he had manufactured in September, and also what he was about to manufacture in May, and the punches in September were made with a small doling in the side; that the subjects that were having them made requested, so the punch wouldn't pivot in its socket on the machine. The punches made in May were used with

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Clifton-direct

a key device that flies into the side of the punch,
but just gives two different patterns to the two sets
of punches, but both sets were engraved, the seven--
Rorer 714.

MR. MARKS: Which are these? Are these the
ones that were done in 76 or 77?

THE WITNESS: There were 21 punches engraved in
September and there were 18 engraved in May.

MR. MARKS: And which are the ones depicted in
the pictures?

THE WITNESS: On 7B was September -- 8B, excuse
me, and 8C is May.

THE COURT: I thought you --

MR. ROTHBLATT: Judge, May is what year?

THE WITNESS: 77.

THE COURT: (Continuing) -- I thought you intended
to show the tablets themselves.

MR. MARKS: I'm going to, your Honor.

THE COURT: That had the same markings and I
thought these tablets were seized in August, 1977;
is that right?

MR. MARKS: The tablets in that suitcase were
seized in 77 --

MR. GRAFFAM: No, 1976.

Clifton-direct

THE COURT: Weren't their tablets seized in August 1977 made from the same machines?

MR. GRAFFAM: No, sir.

The punches that made these tablets were seized.

THE COURT: You have the punches here or the pictures of the punch that showed these punches must have made these markings?

MR. MARKS: That's correct, your Honor.

THE COURT: Well, I don't know how the hearsay testimony as to when these punches were made can possibly come in.

MR. MARKS: I didn't even attempt -- I didn't even attempt to elicit that, your Honor, and I'll rephrase my question so as to not elicit hearsay testimony.

THE COURT: How can it get in if he learned it from manufacturers?

MR. MARKS: I'm not trying to get it in.

THE COURT: It's already in and you say you agree with the defendants that it should be stricken.

All right, then, there's nothing further.

Seat the jury.

(Whereupon, the jury enters the courtroom.)

THE COURT: The testimony by the witness, that he learned the punches were made in September or

October of 1970 is stricken.

I ask the jury to disregard it and it's only something that he heard and can't comment about before the jury.

BY MR. MARKS:

Q All I want to do, Agent Clifton, is tell us what those photographs depict, and I think you've already done that with the exception of 8D and E.

A Ok, 8E depicts a small wooden box, a small paste board box and four bags, plastic bags, which are DEA evidence bags that contain metal punches.

8D depicts the small paste board boxes and the small wooden box.

THE COURT: And, again, you saw the items depicted in those pictures, didn't you?

THE WITNESS: Yes, your Honor.

THE COURT: And you say those pictures fairly and accurately represent those items?

THE WITNESS: Yes, your Honor.

(continued next page)

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9/27/77

Clifton-direct

BY MR. MARKS:

Q And where did you first see the items? I'm now referring to the punches themselves.

A Okay. In regard to 8-C, I first saw these in May of '77.

Q Where did you see them?

A I saw them at the engraving shop in Dallas, Texas.

As to 8-B, I first saw one of the punches in this bag in May of '77 and the rest in August of '77.

In reference to 8-E, I first saw the pasteboard box in May of '77, it was used to contain 8-C in May and I first saw the -- all the long single scour punches in the wooden box in August of '77.

Q August of '77?

A Yes.

Q Where did you see them?

A At the laboratory.

MR. MARKS: I would offer these.

THE COURT: The objections that have been previously made are preserved.

You have any others?

MR. ROTHBLATT: May we see them?

(Handed.)

Clifton-direct

MR. ROTHBLATT: Your Honor, we urge that the photos are not the best evidence and we would object.

THE COURT: The jury may be excused.

(Whereupon, the jury leaves the courtroom.)

(Whereupon, the following occurred out of the presence of the jury:)

THE COURT: I don't think the best evidence rule applies at all, but I'm just curious to know where the punches are.

MR. MARKS: They're in Dallas.

Agent Graffam told me they weighed 40 or 50 pounds, and it would be burdensome for the agent to bring them up here, so I asked Agent Graffam to have Agent Clifton just photograph them instead.

How much do they weigh?

THE WITNESS: Approximately 40 to 50 pounds.

THE COURT: May I see the photographs?

Now, you're going to show that something on these punches made a unique and unusual marking on the tablets?

MR. MARKS: That's right, your Honor.

THE COURT: Where are you going to show it on these punches?

MR. MARKS: You can't see it on the photograph.

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Clifton-direct

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THE COURT: What good are the photographs?

3

Besides, I never let the jury see anything that says "evidence." That's a DEA description. It's not evidence until it's admitted into court.

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What's the sense of the photograph? You want to save the Government some money in not shipping up the item?

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MR. MARKS: I expected a different kind of photograph from the ones that we got. I don't think they're of very great value, but it least it shows what the punches looked like and coupled with the item of Doctor Franzosa, the ballistics expert, they'll have some meaning. He'd going to testify that by making placebo tablets with those punches, he was able to determine that the -- that those punches were used to make the pills contained in this exhibit on the counsel table.

19

THE COURT: Do you have the placebo tablets?

20

MR. MARKS: Yes.

21

THE COURT: And you have the tablets that were seized there?

22

23

MR. MARKS: Yes.

24

THE COURT: I don't see how these can come in, only because they don't show anything, not because

25

Clifton-direct

they're secondary evidence.

MR. MARKS: I am not going to urge that they go in, because I think --

THE COURT: When you're talking about best evidence, you know we do admiralty work here as well as criminal work and we don't have to have a ship brought in here to show it's unseaworthy.

MR. ROTHBLATT: It's a little different --

THE COURT: Of course it's different. Admiralty is a ship. These are punches --

MR. ROTHBLATT: Punches can be brought; ships are a little difficult --

THE COURT: I don't think that's the answer either. I don't think that the punches are the best evidence. I sustained the objection to this only because it shows nothing. It's not evidence. I don't know where you go from here. All this witness has testified to is that there was a seizure and that punches were seized.

Now, I don't know whether the expert will be able to testify that the placebos that he made came out of these punches.

MR. MARKS: He will be able to, because he went down to the laboratory to make the placebos,

Clifton-direct

and that's the testimony I intend to elicit from him.

THE COURT: Then you'll have to show that these punches were delivered to the laboratory.

MR. MARKS: He went down to the laboratory in Dallas.

THE COURT: I know, but how did they get from the plant that was seized to the laboratory?

MR. MARKS: By the laboratory, I mean the plant that was seized.

THE COURT: Oh, I see. That was 2533 Farrington?

MR. MARKS: That's right, your Honor.

THE COURT: He was there?

MR. MARKS: Yes.

THE COURT: How soon after the seizure?

MR. MARKS: I believe he was there on the 19th or the 20th. The laboratory was seized on the 18th.

THE COURT: All right, then you don't have the difficult problem I thought you might have.

I don't know how much further you're going to go with Mr. Clifton.

MR. MARKS: I think no further.

THE COURT: But, it appears that Mr. Clifton had a nice flight here, I hope, and will soon have a nice flight back.

Clifton-direct

I hope you enjoyed Fun City while you're here.

Seat the jury.

(Whereupon the jury entered the courtroom.)

THE COURT: The objection was sustained as to
the last offer by the Government.

BY MR. MARKS:

Q Agent Clifton, did you see any -- withdrawn.

Did you have that laboratory that you just
described under surveillance?

A Yes.

Q For how long?

A Since the middle of February 1977.

Q Did you personally see anybody go in and out
of that laboratory?

A Yes.

Q How many people?

A Four.

Q What are their names?

A David Goodman, Herb Goodman, Paul West and
Theresa Flanagan (phonetic).

MR. MARKS: I have no further questions.

THE COURT: Mr. Rosenthal?

CROSS-EXAMINATION

BY MR. ROSENTHAL:

Q Sir, you say your surveillance started in

Clifton-cross/Rosenthal

February?

A Yes, sir.

Q 1977?

A Yes, sir.

Q Now you described this place as a clandestine laboratory?

A Yes, sir.

Q What does that mean?

A It's a laboratory to manufacture illegal drugs.

Q And its location is generally secret to people; is that correct?

A Yes.

Q And are there many of these laboratories out in the Dallas area?

A I hope not.

Q Do you know of any other laboratories?

A I don't know of the physical locations, but I know that there are some operating.

Q And do you know, through your experience, that they move around, they go from place to place?

A Some smaller ones do, yes.

Q In case they're suspected, they might move from one area to the next?

A Yes.

Clifton-cross/Rosenthal

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Q Now, do you know whether this laboratory was

3

at that location in October of 1977 -- 76?

4

A I know from interviewing several people, I

5

know that.

6

Q You know the laboratory was there?

7

A Yes.

8

Q And do you know what was being manufactured

9

at that time?

10

A Yes, I do.

11

Q Of your own knowledge?

12

A Yes.

13

Q Well, when did you first enter that laboratory?

14

A August 18 of '77.

15

Q You say you were first observing it in February?

16

A Yes.

17

Q And did you see people go in and out at that

18

time?

19

A Yes.

20

Q Did you see trucks being loaded or cars being

21

loaded?

22

A Yes.

23

Q And you took no action at that time?

24

A No, we didn't see anything come out, we saw

25

things go in.

Clifton-cross/Rosenthal

91

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Q

You saw things go in? You never saw things go

3

out?

4

A

No, sir.

5

Q

What type of surveillance did you have at this

6

laboratory?

7

A

Well, for approximately six or seven weeks

8

we had 24-hour surveillance.

9

Q

And you're -- does not your investigation --

10

oh, by the way, are these your notes?

11

MR. ROSENTHAL: Is this his 3500 material?

12

MR. MARKS: No.

13

BY MR. ROSENTHAL:

14

Q

Well, you were investigating this matter, were

15

you not, from February?

16

A

Yes, sir.

17

Q

And doesn't your investigation show that most

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of the equipment in that laboratory was not received until

19

February or March or April of 1977?

20

A

No, sir, that is not correct.

21

Q

Well, I ask you to -- can I have this marked?

22

THE CLERK: A 10-page document marked

23

Defendant's Exhibit A for identification.

24

THE COURT: May I see that?

25

THE CLERK: Yes, sir.

Clifton-cross/Rosenthal

MR. MARKS: Your Honor, could we suspend for just two minutes while I find out from Agent Clifton if he has any 3500 material?

THE COURT: The jury may be excused.

(Whereupon, the jury leaves the courtroom.)

(Whereupon, the following occurred out of the presence of the jury:)

THE COURT: How do you expect to confront this witness with a statement made by Special Agent Shepard?

MR. ROSENTHAL: Your Honor, I'm just going to show it to him, for the purpose of refreshing his recollection. It mentions Special Agent Clifton throughout.

MR. MARKS: Your Honor, I'd like this marked 3500 material.

Agent Graffam has given me some notes of Agent Clifton.

THE CLERK: So marked as Governments Exhibit 3500-33.

THE COURT: I might say to the lawyers, when a question is asked of a witness, "Do you know," that does not necessarily mean, "Did you learn through your own eyes and ears."

Knowledge is obtained in many ways, as I try to

Clifton-cross/Rosenthal

1
2 tell lawyers. If someone asks me whether I know who
3 was the first president of the United States and I
4 say, "George Washington," I never saw him, never
5 heard him, but I know through other sources, but
6 knowledge doesn't always mean direct vision or
7 direct hearing, and so when Mr. Clifton says, "Of
8 course I know this was in operation in September or
9 October," he was perfectly right in answering that
10 way.

11 MR. ROSENTHAL: Your honor, I know that.

12 THE COURT: I want to make sure you understood.
13 You didn't object to it or didn't move to strike.

14 MR. ROSENTHAL: Your Honor, I made the slip
15 and I know what I did.

16 THE COURT: But we understand each other.

17 MR. ROSENTHAL: I didn't say anything.

18 THE COURT: Do you want some time to go over
19 that?

20 MR. ROSENTHAL: Please, I would also like to
21 show that to Agent Clifton.

22 (Whereupon, the jury entered the courtroom.)

23 BY MR. ROSENTHAL:

24 Q Mr. Clifton, after reviewing a document,
25 Defendant's Exhibit A, is your recollection refreshed as to

Clifton-cross/Rosenthal

whether much of the heavy equipment or part of the heavy equipment delivered in that laboratory was delivered after January of 1977?

A Basically, yes.

MR. ROSENTHAL: No further questions.

THE COURT: Mr. Rothblatt?

MR. ROTHBLATT: Just one or two questions.

CROSS-EXAMINATION

BY MR. ROTHBLATT:

Q Mr. Clifton, Government's Exhibit 7 in evidence, is that a photograph of the exterior of the laboratory with the sign, Environmental Testing?

A Yes, this is the sign on the inside of a glass door, at the top of a porch, which is covered by a cement lattice.

Q It appears this was the so-called trade name, this laboratory was operating under?

A Yes, they were using Environmental Testing Control Laboratory.

Q And what would you say the size of the sign is and the size of the letters?

A I'd say the width of the sign is four inches, it's approximately 18 inches long and the letters are probably an inch and a quarter to an inch and a half.

1 Q As far as the sign, it didn't appear to be
2 too clandestine; am I correct?

3 A I'm sure they didn't want to show they were
4 clandestine.

5 Q So that it wasn't a laboratory in the sense
6 it was totally hidden from public view? That's what I mean.
7 It's a laboratory operating under a name?

8 A Yes.

9 Q Called Environmental Testing, whatever that
10 meant?

11 A Yes, that's correct.

12 Q Now, the equipment -- by the way, Mr. Clifton,
13 is your background in chemical engineering or any form of
14 engineering?

15 A No, sir.

16 Q Just investigation?

17 A Right.

18 Q Now, the equipment that was found in there,
19 that are marked on these exhibits, to your knowledge is this
20 the kind of equipment that's used in the making of vitamin
21 tablets or aspirin-type tablets, normally the kind in
22 pharmaceuticals?

23 A I'm sure some of the equipment could be used
24 for that.

25

Clifton-cross/Rothblatt

Q In other words, the equipment itself is not unique, it is the type of equipment that could be used for let's say pharmaceutical products, a vitamin production and so forth?

A Yes, some of it could.

MR. ROTHBLATT: Thank you very much, I have nothing further.

THE COURT: Anything further, Mr. Marks?

MR. MARKS: No, your Honor.

THE COURT: Step down.

Your next witness?

MR. MARKS: Can I have this marked as 3500 material, please?

THE COURT: I'd appreciate you marking all the copies with the exhibit number. The lawyers won't do it and it just delays everything. Just write across the top so you have it.

THE CLERK: Docket marked Government's Exhibit 3500-34.

A two-page document marked Government's Exhibit 3500-35.

THE COURT: Do you have an extra copy of that?

MR. MARKS: Yes, your Honor.

(continued next page)

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Franzosa-direct

EDWARD SYKES FRANZOSA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARKS:

Q Dr. Franzosa, by whom are you employed?

A The Drug Enforcement Administration.

Q And what is your position with the DEA?

A I am a forensic chemist.

Q How long have you been employed as a forensic chemist by the DEA?

A Approximately two and a half years.

Q Can you tell us, sir, something about your educational background in chemistry?

A I received a Bachelor of Science degree in Chemistry from Rensselaer Polytechnic Institute in Troy, New York in 1967; I received my Doctor of Philosophy degree in Physical Chemistry from the State University of New York at Binghamton, New York in 1975.

Q What are your duties as a forensic chemist?

A I make microscopic examinations of tablets and capsules to determine their sources. I try to identify the ingredients in these tablets and capsules.

I also examine and evaluate clandestine laboratories. I do some research, some method development and some training.

Q And when you say you try to identify the substance contained in tablets, how do you go about doing that?

A I use microscopic techniques such as optical crystallography or micro-chemical tests.

In addition I use other chemical and clinical procedures such as infrared spectroscopy or gas chromatography, mass spectroscopy.

Q In the course of your employment with DEA, how many drug samples have you analyzed?

A I've analyzed thousands of tables and capsules.

Q And how many tablets and capsules have you examined microscopically?

A Thousands, sir.

MR. MARKS: I would ask that this witness be qualified.

THE COURT: I find the witness is qualified to express an opinion --

MR. ROTHBLATT: Your Honor, before we go into the substantive testimony of this witness, we have

Franzosa-direct

certain motions with respect to this testimony that deal with Federal Rule 16 and 17, and I'm just wondering whether I should reserve that until we recess? I'd like to make it now --

THE COURT: The jury may be excused.

(Whereupon, the jury leaves the courtroom.)

(Whereupon, the following occurred out of the presence of the jury:)

MR. ROTHBLATT: Your Honor, we were just handed 3500 material, 3500-34 and 35, which contains the worksheets of this witness, dealing with his ballistics examination and 3500-35, which contains his curriculum and some further detail on what he did in connection with these tablets.

Now, we are totally unprepared to deal with this highly sophisticated scientific evidence, coming from what apparently is a very weel qualified and specifically qualified forensic expert.

We've attempted, in our pre-trial motions, hopefully to get every bit of appropriate discovery, so that we can anticipate the issues in this case and meet it fairly and efficiently.

THE COURT: What motions are you talking about?

MR. ROTHBLATT: Well, we moved for a bill of

particulars, we assumed that we had gotten all
discovery material.

THE COURT: Let's be specific.

You tell me the motion that you're talking
about.

MR. ROSENTHAL: Your Honor, aside from the
motions on the bill of particulars --

THE COURT: No, let's talk about one thing
at a time.

Mr. Rothblatt is talking for the record and
I might as well be very specific about it.

MR. ROTHBLATT: In Paragraph 4 in our motion
for our bill of particulars --

THE COURT: Which motion is that?

MR. ROTHBLATT: That's our original motion
-- our motion, your Honor, dated July 25th, 1977.

THE COURT: Now, Paragraph 4 --

MR. ROTHBLATT: Item 4 of the motion.

THE COURT: Four is the bill of particulars.

MR. ROTHBLATT: Correct.

THE COURT: Where do you refer to anything that
has to do with expert testimony?

MR. ROTHBLATT: That's true, your Honor, you're
absolutely correct.

2 THE COURT: It has nothing to do with the
3 motion.

4 MR. ROTHELATT: We were attempting to
5 anticipate every bit of evidence that we would face
6 at this trial. We frankly didn't -- we would assume,
7 if expert evidence were going to be offered, it
8 would be made available to us.

9 THE COURT: You agree you made no demand for
10 it or request for it; isn't that right?

11 MR. ROTHBLATT: I agree in our motion we did
12 not. We tried to cover everything possible --

13 THE COURT: But you know, I can't get --

14 MR. ROTHBLATT: The answer is, yes.

15 THE COURT: "Yes," what?

16 MR. ROTHBLATT: We did not move for expert --
17 discovery of expert evidence in the motion.

18 THE COURT: You made no request for it?

19 MR. ROTHBLATT: No.

20 THE COURT: So I can put the motion papers
21 back.

22 MR. ROTHBLATT: Yes.

23 THE COURT: Next.

24 MR. MARKS: Your Honor, may I just say something
25 for the record with respect to that?

Franzosa-direct

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THE COURT: I want Mr. Rothblatt to be very specific in what he's talking about and then you can respond and you can make notes on what he's talking about, because I'm sure he's talking for the record.

Go ahead, Mr. Rothblatt.

MR. ROTHBLATT: Your Honor, I hope we always speak for the record.

THE COURT: Sometimes we like to think that lawyers are arguing on the merits and they have every reason for what they're talking about, besides just making a technical objection for the record.

MR. ROTHBLATT: Your Honor, it is fundamental fairness, as I understand our rules, when we deal with scientific evidence, that the Defendant should be prepared to meet it and meet it efficiently, if we are to render effective assistance of counsel.

Now, this material is handed to us the first time this morning --

THE COURT: You must admit that you could have asked for any reports of any experts before this trial.

MR. ROTHBLATT: We had no idea --

THE COURT: You know, you could have.

Franzosa-direct

MR. ROTHBLATT: I suppose we could have.

THE COURT: I might say, in some case, lawyers routinely ask for that.

MR. ROTHBLATT: Your Honor, having gone through the first trial, we assumed we got most of the discovery as to the issues in this case and it was just not within our view or conception that we did not get all of the discovery material, that we were entitled to.

We would assume that we have learned everything we could, so we tried, as efficiently as we knew how --

THE COURT: When, for the first time, were you so surprised about this testimony?

MR. ROTHBLATT: Now. When I read the details of this testimony and what we're going to face.

THE COURT: Don't open your mouth yet, Mr. Marks.

MR. MARKS: I'm astounded.

THE COURT: When did you learn that the Government was going to offer this proof, for the first time?

MR. ROTHBLATT: There was some talk about it, I think yesterday. I can't be sure, to be very precise, I can't be sure, but, specifically, I know

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there was talk --

THE COURT: When did you learn something about it, yesterday? Did you ask for a copy of the report?

MR. ROTHBLATT: I heard about it in the opening, yes, yesterday.

THE COURT: But you never asked for anything until this moment?

MR. ROTHBLATT: No, we didn't even ask for it. It was handed to us. We didn't ask for it.

THE COURT: Go ahead.

MR. ROTHBLATT: Our position is: Even if we did get it yesterday, it would be impossible for us to adequately prepare for this issue.

THE COURT: How do you know that? What attempts have you made to get an expert to come into Court?

MR. ROTHBLATT: I had no idea of what the issues were.

THE COURT: Did you ask Mr. Marks what the expert was going to testify to?

MR. ROTHBLATT: I didn't, your Honor. I heard it in the opening, the extent to which it became knowledge to us, I heard that, but whether it was done yesterday or today certainly wouldn't

Franzosa-direct

have made the situation very much better.

We'd be totally unprepared to meet this issue, in this brief period of time.

THE COURT: Go ahead.

MR. ROTHBLATT: And we would object to any of this testimony. We say it violates a principle of fundamental fairness, under the Due Process Clause and under the Fifth Amendment, rendering effective assistance of counsel.

MR. ROSENTHAL: Your Honor, might I just say, obviously this did not come up through the attention of the U.S. Attorney until August 18th or 19th or subsequent thereto.

Mr. Rothblatt made his motions in July; I appeared in this case at the end of July or the beginning of August --

THE COURT: I said he never made a request for any expert's report, not this. It's a drug case.

MR. ROSENTHAL: Normally --

THE COURT: Normally a lawyer says, "If you have any reports give it to me."

MR. ROSENTHAL: Your Honor, I can see how he could be mislead, because number one the United

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2 Attorney didn't know about this until the middle
3 of August.

4 THE COURT: I'm not talking about this.

5 MR. ROSENTHAL: But Mr. Marks turned over to
6 me, in August, all the material he had at that time;
7 the bulk of the scientific material. The chemist
8 I read -- the first chemist I read Mr. Rothblatt's
9 cross examination of the chemist, so I did not
10 anticipate this testimony until yesterday, until
11 Mr. Marks disclosed it. I don't think you anticipated
12 it and you were a little surprised there was going
13 to be further evidence or further conspirators in
14 Texas.

15 THE COURT: I have an excuse --

16 MR. ROTHBLATT: You're the judge --

17 THE COURT: (Continuing) for not knowing about
18 the case until I hear it. I expect the lawyers to
19 prepare for it in advance.

20 MR. ROSENTHAL: That's just one part of my
21 objection. I don't know that much about the analysis
22 of pills with respect to markings on pills, but the
23 other part of my objection is something we discussed
24 earlier, that the dyes are not here, the dyes that
25 made these markings are not here.

1 THE COURT: So?

2
3 MR. ROSENTHAL: I don't believe the chemist
4 should be permitted to testify with respect to the
5 markings on those pills made from the dyes until we
6 see the dyes.

7 THE COURT: Well, objection overruled.

8 I'll let you make the statement on the question
9 of -- when you learned about it, when you found out
10 you had evidence you could use and when you first
11 communicated it to the Defendants.

12 Mr. Rothblatt started out by saying under
13 Rule 16, and that's where it was left hanging, some
14 place in the air, the obligation of the United
15 States Attorney is upon request of the Defendant and
16 so forth.

17 MR. ROTHBLATT: Well, Judge, may I be heard
18 on that?

19 THE COURT: No, I heard you.

20 I'd like to hear Mr. Marks.

21 MR. ROTHBLATT: I'd like to deal with that,
22 if I may.

23 THE COURT: No, I'd like to talk to Mr. Marks
24 and let him state, on the record, what happened here.

25 MR. MARKS: Your Honor, Agent Graffam has

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refreshed my recollection. It was about a week or a week and a half ago that I first learned the possibility that Dr. Franzosa would be able to link, through microscopic examination, the seizure on December 21st, with the laboratory in Dallas.

Yesterday I stated, I think, in considerable detail what the substance of Dr. Franzosa testimony would be.

THE COURT: When did you get this report?

MR. MARKS: This morning. This 3500-35 report?

THE COURT: Yes.

MR. MARKS: Yes, your Honor, I got it about 9:30 this morning.

THE COURT: And when did Dr. Franzosa make his tests?

MR. MARKS: Around August 19th or 20th.

Now, I included all of Dr. Franzosa's work notes in the 3500 material so that counsel had that before the beginning of this trial.

THE COURT: Before the beginning of this trial?

MR. MARKS: Yes, your Honor, when I gave -- I gave the 3500 material to counsel yesterday

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morning before the jury was sworn.

THE COURT: Yesterday, before the jury was sworn --

MR. ROSENTHAL: From 9:30 to 6:15.

MR. MARKS: I didn't hear a motion for a continuance from counsel in order to get their own expert.

And I, in spite of the fact that counsel never requested scientific reports from me, I gave them these reports. I made an offer of proof with respect to Dr. Franzosa's testimony and counsel had ample opportunity to make a motion for a continuance in order to get an expert, if they needed one or indeed after they read the 3500 material to go about and see if they can get an expert before the end of this trial, without asking for a continuance. They didn't avail themselves of either opportunity.

THE COURT: After the examination of Dr. Franzosa, you tell me if you want a continuance, to give you an opportunity to get an expert.

MR. ROTHBLETT: I can tell you, your Honor, from my quick reading of the report, it will be physically impossible during the course of this

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brief trial --

THE COURT: Do you want to get an expert?

Are you representing to me that you will get an expert?

MR. ROTHBLATT: Your Honor, if this were

turned over to us in adequate time --

THE COURT: You see, you're talking through

both sides of your mouth.

MR. ROTHBLATT: I can't pull experts out of

the air.

(Continued on next page.)

DB:jk
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27th

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Franzosa

THE COURT: Why not?

MR. ROTHBLATT: Because I have to find an expert of the same qualifications as this witness, find one that I could have confidence in, confer with, make arrangements with. I don't know where I can find one --

THE COURT: You make it a very complicated proposition. I'm sure a telephone call will bring an expert to you, you, an experienced lawyer -- as a matter of fact, I read your articles avidly in the New York Law Journal and you tell lawyers how to get experts like that. You have lists of them.

MR. ROTHBLATT: Your Honor, you flatter me. It's true I did a book on the very subject, and I can tell you, with all of my knowledge, it's impossible for me to get an expert overnight.

THE COURT: That's what makes your argument sound absolutely silly.

Now, seat the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: I don't know whether I finished the thought, when Mr. Rothblatt asked for argument, but if I didn't, I find the witness qualified to express an opinion in the field of forensic chemistry and, particularly, the identification of sources of tablets

or capsules.

Now, the mere fact that I find the witness qualified doesn't mean you accept his testimony at face value.

I find him qualified and therefore he may express an opinion and you decide whether you will credit his testimony.

If I found him not qualified, he couldn't even express an opinion.

DIRECT EXAMINATION

BY MR. MARKS (Cont.):

Q r. Franzosa, have you had occasion to visit a clandestine laboratory on Farrington St. in Dallas, Texas?

MR. ROTHBLATT: Your Honor, I would object to the word "clandestine." I submit that's a conclusion for the jury.

THE COURT: All right, sustained as to form.

Q A laboratory.

A Yes, sir.

Q When did you visit that laboratory?

A In the middle of August, this year.

Q Do you recall the date?

A No, sir, not offhand, but I believe the 18th of August through the 23rd.

THE COURT: You mean some time during that period,
is that what you were saying?

THE WITNESS: I was there five days, your Honor.

BY MR. MARKS:

Q What did you find at the laboratory, sir?

A I found chemical apparatus such as large reaction
flasks, heat exchangers, or what we call reflux columns,
electrical heating mantles, chemicals and acetylanthranilic
acid, orthotilly-ptyalin (phonetic), nasachloride (phonetic).

I found a 16-station tablet press.

I found a machine for blending material; a
machine for grinding up tablet granulation material, drying
racks, numerous other items of equipment.

Q Based on your examination of what you found, do
you have an opinion as to what the product the laboratory was
making was?

A Yes, sir.

Q What is that?

A The product was methaquaaline.

Q What is the basis for your opinion?

A The chemicals involved, N-Acetylanthranilic Acid,
ortho-toluuidine. These are the two principal precures or
primary materials for the manufacture of methaquaaline.

I also found toluene, which is the solvent, the

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liquid solvent in which the reaction of the Acetylanthranilic Acid and the ortho-toluuidine would be carried out.

In addition, I found phosphorus hydrochloride, which is a catalyst, which activates this reaction, to make the methaquaalune. These are all that one needs to make methaquaalune.

Q Did you find any methaquaalune in the laboratory?

A Yes, sir, we found a bag of material which I had estimated, at the time, to weigh approximately 75 lbs., which I took a sample out of and went to the Dallas Regional Laboratory of the Drug Enforcement Administration, and I analyzed this sample and it was found to contain methaquaaline, toluene, the solvent, Ortho-toluuidine, one of those two precursors, and another material which I have not yet identified, but which I have found in other manufactured samples of methaquaaline, non-commercially manufactured samples of methaquaalune.

Q Did you examine the tableting machine that you said you found there?

A Yes, sir.

Q Did you operate it?

A Yes, sir.

Q Was it operable?

A Yes, sir.

MR. MARKS: Will you mark this, please?

THE CLERK: Substance marked Government

Exhibit 9 for identification.

BY MR. MARKS:

Q Would you please take a look at the exhibit that has just been marked for identification and tell us if you recognize it?

A Yes, sir.

Q What is it?

A This is approximately 1,100 placebo tablets made on the 16th station, single rotary press, found in that laboratory in Dallas, Texas.

Q And who made them?

A I did.

Q And when you say placebo tablets, will you tell us what that means?

A I obtained from a local tableting manufacturer a material whose composition contains no drugs. The material is what you would use in making tablets, after you added drugs to it. They are binders, excipients and lubricants. This is standard material used to make tablets. Placebo simply refers to the fact that there are no drugs in these tablets.

Q How can you tell, sir, from Government's 9 for identification that these are the tablets that you just

described?

A This plastic bag has on it an evidence sticker which has my name and the date and the case number, and I wrote this evidence sticker and placed it in the bag and heat-sealed it.

In addition, I recognize my handwriting on the front of it.

Q When, sir, did you make these tablets on the tableting machine?

A I believe it was the 23rd day of August, this year.

MR. MARKS: The Government offers this.

MR. ROTHBLATT: We would object, as we've indicated in our colluquy, that the best evidence, namely, the press and so forth --

THE COURT: Yes.

MR. ROTHBLATT: That we've indicated should be here available to us before the product of the press could be made -- could be received in evidence.

THE COURT: Objection overruled.

Take the exhibit out of the bag.

I think there are two bags there, an outer bag and an inner bag.

MR. MARKS: There are two bags, sir.

1
2 THE COURT: It's the inner bag that will be
3 marked. Mark the inner bag.

4 MR. MARKS: I will take this off, your Honor.

5 THE COURT: Yes.

6 THE CLERK: Government's Exhibit 9, previously
7 marked for identification now marked in evidence.

8 THE COURT: We'll put a -- some taping over that
9 sticker.

10 The agency put a sticker with a legend on the
11 exhibit, which is not part of the exhibit, so I'm just
12 going to cover it.

13 How the Drug Enforcement Administration describes
14 an exhibit is of no consequence and unimportant to us.

15 As far as what the witness says on the witness
16 stand concerning the exhibit, that is relevant; nothing
17 else.

18 So, I will ask my Courtroom Deputy to put some
19 masking tape on it.

20 All right, we're ready, Mr. Marks.

21 BY MR. MARKS:

22 Q These pills have a legend on them, Rorer,
23 R-o-r 714; is that correct?

24 A Yes, sir, that is correct.

25 Q They also contain a single score on the reverse

side; is that correct?

A Yes, sir.

THE COURT: Of course, that was made by the machine, wasn't it?

THE WITNESS: Yes, your Honor.

Q Do you know, sir, how many tablets that machine is designed to turn out in a twenty-four hour period?

A At full production capacity, somewhere between five and ten million tablets.

Q Now, you examined Government's Exhibit 14 in evidence earlier today; is that correct, in my office?

A Yes, sir.

THE CLERK: Excuse me. That's Government's Exhibit 6.

Q Government's 6.

A Yes, sir.

Q Have you ever -- withdrawn.

Did there come a time, sir, when you received a representative sample of tablets from this exhibit?

A Yes, sir.

Q When was that?

A That was in -- I'm not sure, sir. May I consult my notes?

Q Yes, would you please?

THE COURT: Mark the notes for identification.

THE CLERK: So marked Government's Exhibit 10 for identification.

A By my worksheet it indicates that on March 2, 1977, I received a representative sample of that exhibit.

Q Now, the tablets in this exhibit also bear the legend, "RORER 714"?

A Yes, sir.

Q And they contain a single scoring on the reverse side; is that correct?

A That is correct.

Q Did you do anything to these tablets to determine whether or not they were made on the same machine as produced Government's Exhibit 9, the placebos?

MR. ROSENTHAL: Your Honor, I would object. I know the doctor received them in March, but I don't know how he received them, the chain of custody, how they came to his possession.

MR. MARKS: We're going to have to have some colloquy on this, your Honor.

THE COURT: The jury is excused.

(Whereupon, the jury leaves the courtroom.)

(Whereupon, the following occurred out of the presence of the jury:)

Franzosa-direct

THE COURT: I thought it was part of the stipulation?

MR. ROSENTHAL: Is it?

MR. ROTHBLATT: No --

THE COURT: Wasn't the stipulation recited at the outset?

MR. ROTHBLATT: No, we stipulated what was found in the suitcases were methaquaaludes. That we did stipulate to.

THE COURT: And these were the Quaaludes that was seized on the 20th.

MR. ROSENTHAL: Yes, but this was not the chemist who made the examination for the trial.

MR. MARKS: The first trial, that is correct.

We can certainly prove the chain of custody, if we can't get a stipulation. I can have another agent come up. It will mean a little bit of delay --

THE COURT: Mr. Marks, wasn't there an exchange, you gave something, you gave up, as I recall, the proof --

MR. MARKS: The threats.

THE COURT: The threats to obtain payment. I remember that. The defendants conceded the chain of custody.

Franzosa-direct

MR. ROTHBLATT: Yes.

MR. MARKS: That was the chain of custody.

MR. ROTHBLATT: With respect to those --

MR. MARKS: It was an oversight on my part. I did ask for a stipulation with respect to the chain of custody at the time the DEA seized this at the airport. They sent the samples to Dr. Franzosa, that chain they haven't stipulated to.

I will ask for a stipulation. If counsel won't, give it to me, I will have to call --

THE COURT: I'm sorry, but to me the stipulation of a chain of custody means these are the Quaaludes that were seized on December 20th --

MR. ROTHBLATT: That's right.

THE COURT: If he says these are the Quaaludes he examined, what difference does it make that it traveled through 50 hands. I don't understand the problem at all.

MR. ROTHBLATT: We'll concede, your Honor, that the Quaaludes seized on December 20th are methaquaaludes.

THE COURT: These are the Quaaludes?

MR. ROSENTHAL: They were examined by some chemist in New York.

THE COURT: Now, this chemist says I examined one

1 of the samples. He identifies it. You pointed to
2 these Quaaludes in the valise and he says these are the
3 Quaaludes I examined.
4

5 MR. ROTHBLATT: You see, the problem we get into,
6 your Honor, is the same problem I put to you before, the
7 nature of this expert testimony comes as a complete
8 surprise to us. The other testimony that constituted
9 methaquaaludes, we weren't prepared to dispute. We
10 were prepared to stipulate everything that goes with it.
11 This we were totally unprepared for and certainly
12 couldn't stipulate to something that we weren't prepared
13 for.

14 THE COURT: Mr. Rothblatt, I have trouble
15 following you. I must confess that.

16 MR. ROTHBLATT: I'll try to make it simpler --

17 THE COURT: We're talking about the chain of
18 custody at this moment. We're not talking about your
19 surprise and your difficulty in getting experts.

20 However, if you stipulated that these bags in
21 that valise were the Quaaludes that were seized on
22 December 20th and this witness is able to testify that
23 this is -- these are the Quaaludes we examined for
24 markings, what's the problem on the chain of custody?

25 MR. ROTHBLATT: Your Honor --

Franzosa-direct

1
2 THE COURT: Does the Government have to come in
3 to prove, after they were seized, that they were given
4 to Agent X, who put them in an evidence vault and then
5 they were surrendered to this chemist, who made an
6 analysis and then delivered them back to the evidence
7 vault? You already have conceded that when you said
8 these are the Quaaludes.

9 MR. ROSENTHAL: Your Honor, I believe a small
10 quantity, maybe one bag was transported to the chemist
11 to examine and prepared with the placebos. Am I
12 correct?

13 MR. MARKS: Two bags.

14 MR. ROSENTHAL: All I would ask for, I might
15 enter into a stipulation if he tells how he got them
16 there.

17 MR. MARKS: We have the chain of custody reports --

18 THE COURT: The point I'm making is: In my mind,
19 the lawyer has already entered into the stipulation.
20 Now they're saying we didn't mean it.

21 MR. ROTHBLATT: We knew nothing about this until
22 yesterday. Yesterday is the first time --

23 THE COURT: Suppose ten other agents handled it
24 in the meantime? You still stipulated these are the
25 Quaaludes.

1 MR. ROTHBLATT: No question they are Quaaludes.

2 They are received --

3 MR. MARKS: Can I have these marked, please?

4 THE CLERK: 3500?

5 MR. MARKS: Yes, 3500.

6 THE COURT: What you're really saying is,
7 because you didn't know that another test was made, that
8 that affects your stipulation to enter into custody --

9 MR. ROSENTHAL: No, your Honor.

10 THE COURT: What is the understanding?

11 MR. ROSENTHAL: My point is that one or two,
12 two bags were removed from the evidence safe and vault
13 and transported to this man. I just want to know, and
14 I owe a duty to my client to see how it was sent. And
15 if it's satisfactory to us, I'm not going to cause any
16 uproar, and I'll even stipulate, but this is new
17 evidence that the Government is actually using.

18 THE COURT: All right, look at the evidence the
19 Government is showing.

20 THE CLERK: Two reports marked Government's
21 Exhibits 3500-36 and 3500-37.

22
23 (continued next page)
24
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9/27.

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Franzosa-direct

2 MR. ROTHBLATT: Might this be a good time for
3 recess --

4 THE COURT: No, I'm suspending at 4:30. This
5 case is running behind time. I'm concerned about finish-
6 ing this case by Thursday.

7 MR. ROTHBLATT: We're going to have to have a
8 luncheon sometime --

9 THE COURT: You'll have a luncheon at one o'clock.
10 I have a judge's luncheon at 1:00 o'clock. I discuss
11 business in my lunch hour.

12 MR. ROSENTHAL: We discussed business yesterday
13 too.

14 MR. ROTHBLATT: It's a question of time.

15 THE COURT: Would you care to tell me, at this
16 time, whether the defendant is going to put on a case?

17 MR. ROSENTHAL: Yes.

18 THE COURT: You will put on a case?

19 MR. ROSENTHAL: I believe I will.

20 THE COURT: This could go into next week.

21 MR. MARKS: How about the defense money?

22 MR. ROTHBLATT: Let me say this, I'm not consider-
23 ing -- but it's subject to change --

24 THE COURT: Well, that's to retain the element
25 of surprise --

Franzosa-direct

MR. ROTHBLATT: No, Judge, I'm trying to be candid. I don't want to mislead you.

THE COURT: I don't think it surprises the Government in any one of these cases, because if new testimony comes up and the Government wants time to rebutt it, I'll give it to the Government.

MR. ROTHBLATT: I'm trying to not tell you -- say to you I made a representation and then I change my mind.

THE COURT: I'm just trying to schedule it.

MR. ROTHBLATT: I'm telling you what my inclinations are, being as candid as I can.

THE COURT: Mr. Rosenthal indicated there would be some testimony, but not lengthy.

MR. ROSENTHAL: I can't anticipate taking more than two hours.

THE COURT: Two hours is a lot of time. That means the afternoon, at least this afternoon.

MR. MARKS: That would be the end of the case, then, your Honor, because I think I can finish up before lunch.

THE COURT: Let's hope we can have summation and charge before tomorrow. Let's understand each other. Is there any question about the chain of title?

Franzosa-direct

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2 MR. ROTHBLATT: We want the chain of custody,
3 your Honor, only established through stipulation, not
4 through these exhibits.

5 In other words, you made a representation, as
6 I understand, that two packages : came out of that
7 suitcase, were sent in some manner to this witness and
8 he examined them?

9 THE COURT: Maybe Special Agent Graffam can tell
10 us.

11 MR. MARKS: I believe he can tell us in great
12 detail.

13 MR. ROTHBLATT: Let him offer the stipulation
14 and we'll see whether we agree --

15 THE COURT: First tell us what happened.

16 MR. GRAFFAM: This was transported to our
17 laboratory, routinely --

18 MR. MARKS: What happened here, not routinely.

19 MR. GRAFFAM: Because of the number of tablets and
20 the possibility of how many punches were used, I asked
21 the chemist to withdraw an additional 250 tablets in
22 addition to the 50 he sent.

23 MR. MARKS: What's his name?

24 MR. GRAFFAM: Roger Guardino (Phonetic), the
25 regular chemist. He withdrew 250 and placed them in a

Franzosa-direct

sealed container, shipped them, registered mail to our special testing unit in McLean, Virginia where Dr. Franzosa received them.

It's a standard procedure that a certain portion of all tablets we seize or buy are sent to McLean, Virginia.

THE COURT: They were sent to this witness directly?

MR. GRAFFAM: Dr. Franzosa would have to answer.

THE COURT: Were they addressed to you? Do you recall?

THE WITNESS: No, sir. They were sent in a sealed container, return receipt requested, registered mail. We have an evidence technician, she receives all of the exhibits and she opens them up and makes a chain of custody card at our lab, and those are given to the supervisors of the lab, who in turn gives me only the paper work and I go to the evidence custodian, the evidence technician, and I get the evidence directly from her in our vault.

THE COURT: Yes.

MR. ROTHBLATT: And you have locked facilities for keeping it?

THE COURT: You examined it?

THE WITNESS: I examined it.

Franzosa-direct

THE COURT: Then did you put them back in a locked, sealed envelope again?

THE WITNESS: No. In this case the tablets were contained in what we call our reference correction, which were a locked collection of tablets we keep to refer back to, should subsequent exhibits come in.

THE COURT: So you retained them down in Washington?

THE WITNESS: Yes, sir.

THE COURT: And you brought them up with you?

THE WITNESS: Yes, sir.

THE COURT: I thought they were mailed back and that was the question.

MR. ROTHBLATT: Do I understand --

THE COURT: Where are they --

THE WITNESS: Upstairs --

MR. MARKS: Why they're upstairs, I have no idea, but that's where they are.

THE COURT: Now, of course, he couldn't make a comparison between what you did in Dallas, the tablets, in other words that came out of the machine and any other tablets in that suitcase, can you, a microscopic examination?

THE WITNESS: I did my analysis on the tablets I received, which are a representative sample.

Franzosa-direct

THE COURT: But suppose I gave you another tablet out of that suitcase --

THE WITNESS: Yes, then I can do -- if I had the equipment --

THE COURT: That's what I mean.

THE WITNESS: If I went back in Plains, Georgia--

THE COURT: Nothing you can do visually?

THE WITNESS: You can look at them, but then you only see the gross characteristics are the same. I need a microscope to show the detailed characteristics.

THE COURT: Any ordinary microscope?

THE WITNESS: We use what we call a stereo microscope, because it allows you to have a great deal of depth. It's analogous to be ballistics examination done for bullets and I don't think that would be -- you could do that in Court either, unless you were to bring in some very specialized -- you can conceive hooking a T.V. camera up to a microscope and doing that, but we have never done it. I honestly do not know if it's possible. I would assume, given enough time to get the technical problems solved it would be possible.

THE COURT: What kind of microscope did he use, a Zitz (Phonetic).

(continued next page)

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2 THE WITNESS: The Stereo Microscope is a Bauche
3 and Lomb and the other one is a Leitz (Phonetic).

4 THE COURT: A Leitz, I meant to say. The hyphenated
5 name --

6 THE WITNESS: Leitz-Leica.

7 MR. MARKS: We're just waiting for the exhibit,
8 your Honor.

9 Can I tell the jury then that it is stipulated?

10 THE COURT: Let's mark that particular seal
11 separately. Mark it for identification.

12 THE CLERK: Bottles, containing tablets,
13 marked Government's exhibit 11 for identificatio.

14 MR. MARKS: What I'd like to do, your Honor, is
15 perhaps your Honor can instruct the jury that it's
16 been stipulated that Government's 11 are tablets contained
17 from Government's six.

18 THE COURT: I want to hear the stipulation first.

19 Is that stipulated?

20 MR. ROTHBLATT: Yes.

21 MR. ROSENTHAL: Yes.

22 MR. ROTHBLATT: Upon their representation that's
23 a fact, we'll accept the stipulation.

24 THE COURT: All right, fine.

25 MR. MARKS: I think we're ready, your Honor.

THE CLERK: Then Government's exhibit 11 previously marked for identification is now marked in evidence.

THE COURT: Describe it. How many jars.

THE WITNESS: I believe there's 16 jars.

THE CLERK: Sixteen jars of various sizes.

THE COURT: I understand that I am to instruct the jury on a stipulation.

The defendants have stipulated that Government's exhibit 11 which Mr. Marks is holding in his left hand, is a part and came out of exhibit 2, is it --

MR. MARKS: Number six.

THE COURT: Number six, which consists of a trunk full of tablets, to which Mr. Cantor testified was part of -- was the substance seized by Special Agent Graffam on December 20, 1976.

Does that represent the stipulation fairly?

MR. ROSENTHAL: Yes.

BY MR. MARKS:

Q Sir, when was the first time you saw Government's exhibit 11, which I now show you?

A March 2, 1977.

Q Now, just so we're not confused, Government's exhibit 9 are the placebos that you made on the tableting machine on Farrington Street in Dallas, is that correct?

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2

A Yes.

3

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Q Did you conduct any tests on Government's 9 and Government's 11?

5

6

A Yes, sir. I took tablets from each exhibit and I compared them under a microscope.

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8

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I looked very carefully at the microscopic tool marks. These are small lumps, nicks and gouges, ridges, etc. In the process of manufacturing tablets, one uses steel punches. These are the tools which make the scour marks, and the Rorer 714 on the two faces of the tablets.

12

13

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In addition to these gross characteristics, each tool has a set of unique identifying microscopic characteristics. These are lumps and gouges and so on.

15

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I compared the tablets in these two exhibits, against each other and found the tablets in each exhibit showed the identical microscopic tool marks, and therefore they must have been made by the same punches.

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Q And is that your opinion, sir?

A Yes, sir.

MR. MARKS: I have no further questions.

THE COURT: Can you tell us whether there were more than one different, unique microscopic markings that you found identical in the tablets?

THE WITNESS: Yes, sir.

Franzosa-direct

When I performed my analysis of this exhibit, I found that there were at least 13 pairs of punches involved in making these tablets and each punch had a different set of microscopic characteristics.

THE COURT: Now, you made how many punches down on Farrington Street?

THE WITNESS: I took 17 of the punches down there to make the placebo tablets.

THE COURT: All right, on all of the placebo tablets that you examined, were they the same microscopic unique markings on those tablets?

THE WITNESS: Yes, sir.

THE COURT: And when you compared those markings with the microscopic markings on the sample that you received out of exhibit number six, did you find all the tablets similarly marked?

THE WITNESS: Yes, sir.

THE COURT: How many of those tablets did you establish came out of exhibit number six?

THE WITNESS: I received 250.

THE COURT: And everyone of the 250 has what you describe as unique markings?

THE WITNESS: No.

What I am saying is I identified 13 different

Franzosa-direct

pairs; I found and I have them numbered. As a matter of fact that's why there are so many little jars in here. I took some of it, each of the different jars, and went to these tablets and found tablets that compared.

So, no, I did not take every single one of these tablets and compare them, I just compared 13 representative sets of tablets out of here and found comparison-identical tablets in these.

(Whereupon, Sheldon Silverman relieved Daniel Olarnick as the Official Court Reporter.)

(continued next page)

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Franzosa- cross/Rothblatt

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1 THE COURT: My question is slightly different.
2 If you find the same unique markings on those same
3 thirteen tablets that came out of Exhibit 6?
4

5 THE WITNESS: Yes, sir.

6 THE COURT: That's the question.

7 Mr. Rosenthal?

8 MR. ROSENTHAL: No questions.

9 THE COURT: Mr. Rothblatt?

10 MR. ROTHBLATT: Yes.

11 CROSS-EXAMINATION

12 BY MR. ROTHBLATT:

13 Q Dr. Franzosa, did you use any other tablets
14 to compare microscopically with the placebos you ran, to see
15 if there's any similarity to the placebos?

16 A Did I compare the placebos with some other
17 exhibits?

18 Q That's correct.

19 A Yes, sir, I did.

20 Q Did you make notes on the points of comparison
21 between the ones that had been marked in the exhibit number
22 that's in front of you --

23 THE COURT: 11.

24 MR. ROTHBLATT: Thank you.

25 Q (Continuing) Did you make some notes on the

points of comparison in 11, Dr. Franzosa?

A No, sir, that is not my procedure.

Q What notes do you make as you run your tests?

A What I do is under a stereomicroscope, I'm able to look at two tablets or two sets of tablets simultaneously. I compare, side by side, tablets from the different exhibits in pairs so I'm able to see on the left side.

For example, if I'm going to compare this exhibit with this exhibit (indicating), I'll place a tablet from this side on the left and I will look at tablets on the right side from this exhibit and if I find then ones that have the same identical markings I have made a match. I do not keep notes as to how many lumps or gouges or ridges I see because I'm making a side-by-side comparison at the same moment in time.

Q Do you describe -- is there any memorandum at all where you describe "dissimilarity" of what you see under the microscope?

A In my worksheet I have stated that the tablets came from the same pairs of punches --

Q That's a conclusion, Doctor.

I want to know if you put any specific findings or descriptions of what you see under the microscope?

A No.

Q Doctor, I notice that in your vita curriculum you are a member of the American Academy of Forensic Sciences; is that correct? You are a member?

A I'm a provisional member at this time.

Q I take it part of the literature that you read and study in connection with your professional work as a forensic scientist, forensic chemist, is the Journal of the American Academy of Forensic Sciences; is that correct?

A I do read the Journal of Forensic Sciences, yes.

Q Would you agree that that journal is one of the authoritative journals or literature in the field of forensic sciences?

A Some of the articles contained within that journal are authoritative.

Q Generally, the members of this organization and the articles that are contributed try to deal with the latest documents in the field of forensic sciences; isn't that correct?

A That may be the object of the journal. I do not publish the journal.

Q You read it, study it?

A I read it.

Q Keep up on the latest developments?

A I read other journals, however, at the same time.

1
2 Q I'm talking about this journal first. We'll
3 get to the others later.

4 I'm speaking of this journal, the Journal of the
5 American Academy of Forensic Sciences.

6 A I read the Journal.

7 Q Are you aware, Doctor, that there are cameras
8 which photograph ballistic comparisons that are made under
9 microscopes, yes or no?

10 A Yes, there are ballistics microscopes with
11 camera attachments.

12 Q Did you arrange to have cameras photograph what
13 you saw with your eyes so that it could be exhibited as an
14 exhibit here in this courtroom?

15 A No, sir.

16 Q Are you aware that in the American Academy of
17 Forensic Sciences, when they talk about ballistic comparisons
18 the authors recommend that all exhibits be photographed when
19 evidence is intended to be offered in court; are you aware of
20 that?

21 A I have not, to my recollection, seen that
22 written out.

23 Q Have you attended any of their seminars where
24 discussions of how to effectively demonstrate scientific
25 evidence in a courtroom where they emphasize that photographs

should be brought in wherever possible so a jury could see it?

A Not to my memory do I remember such a speaker.

Q Wouldn't you agree that photographic evidence of what a scientist sees is the best evidence for a fact-finder to determine rather than your opinion that we can't verify with our own eyes?

A Not in all circumstances, no, sir.

Q You think that your oral opinion is better evidence than photographs of what you've seen; is that what you're saying?

A In some circumstances, yes, sir.

MR. ROTHBLATT: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. MARKS:

Q Dr. Franzosa, on the basis of your experience with ballistic microscopes which have cameras attached, if Mr. Rothblatt were to get a sample from Government's 11 and a sample from Government's 13, could he make photographs?

A Yes, sir; there would be one major problem. We tried this in the past and found that the optical set-up of a ballistic microscope does not have enough depth of field. In fact, one might have to take twenty or thirty or more pictures of one pair of tablets to come up with enough

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2 photographs to adequately show the comparison that I make with
3 my own eyes in a much shorter period of time.

4 MR. MARKS: No further questions.

5 THE COURT: Mr. Rosenthal?

6 MR. ROSENTHAL: No questions.

7 RECROSS-EXAMINATION

8 BY MR. ROTHBLATT:

9 Q Doctor, have you ever attempted to use the
10 sophisticated photograph equipment on the market to photograph
11 tablets?

12 A Yes, and the results have been inadequate,
13 grossly inadequate.

14 Q Are you telling this Court and jury, Doctor,
15 that there are no cameras that are presently available to
16 photograph what you saw with your own eyes under a microscope?

17 A Since I described the depth of field which is,
18 in effect, what is in focus is so shallow and the tablets have
19 a great deal of profile in terms of depth of field that it is,
20 in my experience, with the equipment that I had available to
21 me, impossible to get a good, true, representation.

22 Q I'm talking about equipment, photographic
23 equipment that is available to do that very thing, to photo-
24 graph microscopic scenes of things that are seen visually
25 under a microscope that can be photographed.

1 Have you ever explored the photographic equipment
2 available to do it, yes or no?

3
4 A I have used the equipment in my laboratory.

5 Q I didn't ask you that.

6 THE COURT: Do you know of any other equipment
7 that might do a better job?

8 THE WITNESS: Having talked with some of the
9 manufacturers of this equipment, none of them were able
10 to come up with the lenses that would give me the depth
11 of field I desired.

12 Q What photographic manufacturers did you talk to
13 about getting photographs of these tablets?

14 A Nikon, Leica, American Optical, Bausch and
15 Lombe.

16 Q Have you ever heard of the B-a-l-l-e-s-t-r-o-m
17 camera that was designed specifically for the photographing of
18 ballistic comparisons; yes or no?

19 THE COURT: Again, it depends on this witness'
20 answer. If the witness says he has heard of such
21 equipment and it is designed to do what Mr. Rothblatt
22 says, then you may assume that there is such equipment,
23 but if the witness says no, don't assume what
24 Mr. Rothblatt has incorporated into his question is so.

25 Go ahead, now you may answer.

2 A No, sir, I have never heard of such a device.

3 Q Have you ever heard of the camera that was used
4 to photograph the bullets that were examined microscopically
5 that caused the death of Senator Robert Kennedy; have you
6 heard of that camera? Yes or no?

7 A I do not know what camera or what device was
8 used.

9 Q The Ballestrom camera.

10 MR. MARKS: Objection.

11 THE COURT: Objection sustained; strike that out.

12 The jury is to disregard it. That's testimony,

13 Mr. Rothblatt.

14 Q Have you gone to the American Journal, the
15 American Academy of Forensic Sciences, to find out in their
16 literature whether or not there are cameras available to
17 photograph what you saw visually under the microscope, yes or
18 no?

19 A I have used the ballistics cameras we have in
20 our laboratory and I have talked to the manufacturers from
21 Nikon, from American Optical, from Bausch & Lomb to ask them
22 if they had equipment that could accomplish my task. Their
23 answer was no.

24 Q My question is did you go to the Journal of the
25 American Academy of Forensic Sciences, the Journal that you

1
2 read and recognize, to find whether those journals would lead
3 you or give you a camera that could accomplish the job of
4 photographing what you saw under the microscope; yes or no?
5 Did you do that?

6 A I read through the copies of the journals that
7 I had and did not find any information.

8 Q Did you search specifically, for a camera that
9 would help you in that; yes or no?

10 A I don't believe I searched specifically for a
11 camera. I read the articles on ballistic examinations and
12 did not find anything of use in the journals that I own.

13 Q The question is, did you search for a camera
14 that could help you so you could have photographic evidence
15 in this court?

16 THE COURT: Objection sustained. It's now
17 become argumentative.

18 MR. ROTHBLATT: I have no further questions.

19 THE COURT: Anything further?

20 MR. MARKS: No.

21 THE COURT: You may step down.

22 (Witness excused.)

23 THE COURT: Next witness?

24 MR. MARKS: Apparently, he's upstairs. It will
25 take two minutes to get him down here.

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1 MR. MARKS: Your Honor, I would like to call a
2 rebuttal witness. He's out of town. I expect that he
3 will testify. I couldn't get him here before tomorrow
4 morning.

5 THE COURT: Are you sure he will be here tomorrow
6 morning?

7 MR. MARKS: I am -- no, I am not sure. I have
8 been on the phone with the agents in Texas. And the
9 agent who will be able to tell me definitely whether
10 this man will be able to appear tomorrow morning is
11 enroute between Dallas and Houston. I won't be able
12 to talk to him on the phone for another hour.

13 MR. ROTHBLATT: May we have an offer of proof?

14 THE COURT: Only if the Government is willing
15 to give it.

16 MR. ROTHBLATT: Well --

17 THE COURT: This will give you all the time you
18 need to get your expert, too. Look at the advantage
19 you have.

20 MR. ROTHBLATT: Not enough time, Judge.

21 THE COURT: Not enough?

22 MR. ROTHBLATT: Not enough.

23 MR. MARKS: If your Honor would like --

24 THE COURT: By tomorrow you can put on the
25 record the efforts you have made to get the expert and

2 1 how much time you will need and why you need the time.

2 MR. ROTHBLATT: I can tell you right now without
3 the -- whatever they call it, the press --

4 MR. ROSENTHAL: The stamp.

5 MR. ROTHBLATT: The stamp.

6 THE COURT: Yes.

7 MR. ROTHBLATT: I couldn't even start.

8 THE COURT: Without the stamp? You mean without
9 the instrument itself?

10 MR. ROTHBLATT: That's right. Without the
11 instrument. I certainly --

12 THE COURT: How do you know that without asking
13 the expert?

14 MR. ROTHBLATT: I have a pretty good idea of
15 what --

16 THE COURT: Well, I've got a good idea that you
17 don't need it because the expert didn't need it.
18 You're talking about the actual machinery. What do you
19 call that?

20 MR. ROTHBLATT: The punch.

21 THE COURT: The punch. That's what you say you
22 need.

23 MR. ROTHBLATT: That's right. After all, he was
24 the one who allegedly prepared the placebos and compared
25 his placebo with the tablets.

THE COURT: Yes.

MR. ROTHBLATT: He was the one who used the punch.

THE COURT: Yes.

MR. ROTHBLATT: I mean, getting involved with tablets and punches is not the routine criminal case. This is the first time in my career -- and I have tried a few cases over the years -- that I have been confronted with this kind of an expert.

THE COURT: And I have tried almost as many as you have and I don't believe you need the punch.

MR. ROTHBLATT: That's where we differ.

THE COURT: That's one expert against one expert.

MR. ROTHBLATT: Except you try it from up there and I try it from down here.

THE COURT: And as one expert to another expert, I say what you just said is pure poppycock.

MR. ROTHBLATT: That is your opinion.

THE COURT: And I'll tell you why. I can't believe that you really believe what you are saying.

MR. ROTHBLATT: Judge, to me -- first, I've got to find an expert who knows something about this field, which is not --

THE COURT: If I want to find an expert, I'd call you and expect you to get me one in about five

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minutes.

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MR. ROTHBLATT: If you're talking about --

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THE COURT: They are crawling all over New York City.

4

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MR. ROTHBLATT: If you're talking about a forensic scientist, a forensic pathologist, --

6

7

THE COURT: All we need is a forensic chemist.

8

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MR. ROTHBLATT: If you're talking about a polygraphic expert, you're right. I know lots of them.

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THE COURT: But you don't know any forensic chemist.

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MR. ROTHBLATT: I know forensic chemists, but not in this area. Frankly, the forensic chemists that I know, none of them are in New York. The ones that I know are not in New York. And I don't know anybody in the area of tablets and punches.

17

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THE COURT: There's hardly a place in the United States that's more than four hours away by plane.

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MR. ROTHBLATT: I agree. I have to get a name to start off with, one that you've got a rapport with, and then you can --

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THE COURT: Well, you can create more problems for yourself than I can imagine.

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MR. ROTHBLATT: It is not my problem.

THE COURT: That's what I am saying. You don't

1 have one.

2 MR. ROTHBLATT: I wasn't -- I'm saying I wasn't
3 presented with that kind of an expert. I am faced
4 with it. Or at least that's the problem.

5 THE COURT: The reason I am saying what I said
6 is because you made such a fuss about being surprised
7 by the Government witness not being able to prepare a
8 witness of your own. That's why I am saying what I said.
9 You said enough on the record to convince me --

10 MR. ROTHBLATT: Judge, I said --

11 THE COURT: -- that you don't want time to get
12 an expert. You just want to make a record.

13 MR. ROTHBLATT: In fairness, that should have
14 been turned over long in advance we could adequately --

15 THE COURT: Make that point four in your appeal.
16 Seat the jury.

17 (Whereupon the jury entered the courtroom.)

18 THE COURT: I expected to finish the case today
19 and I had hoped to finish it, but the Government is
20 asking for time. And so I am suspending at this time
21 and continuing the case until tomorrow. But I hope to
22 start early tomorrow. And I expect to work late.
23 Probably until 7:00 o'clock. I seldom go beyond 7:00
24 o'clock. I hope that we can finish the case, that I
25 can charge the jury and then give you the case tomorrow.

1
2 that for yourself.

3 So, the agents went out to the airport on the
4 21st and this is what they found contained in that
5 brown wrapper, they found this very suitcase containing
6 approximately 25,352 pills, not far off from the 256
7 which she said were contained in the suitcase. And
8 we know where these pills came from, through the testimony
9 of Dr. Franzosa and Agent Lloyd Clifton, they came from
10 an illegal laboratory that was turning out these pills
11 by the millions, it appears, in Dallas, Annette Boney's
12 home town.

13 So, that was the third delivery of qualudes to
14 Michael Cantor.

15 You will recall that Cantor testified that he
16 owed Annette Boney about \$50,000 and that testimony is
17 corroborated by the conversation that the Drug Enforcement
18 Administration recorded between Michael Cantor
19 and Annette Boney on December 28, and we heard that
20 conversation, and in that conversation Cantor asked
21 Annette, "How much do I owe you?" And she said, "About
22 49--no, it's more than that. Wait a minute, hang on
23 a second. It's 492 and there are some other things,
24 it's 50." \$50,000.00. It was in the course of that
25 conversation that Cantor repeated what he had repeated--

1
2 all over this trial. It's a conspiracy in which the
3 participants were Michael Cantor, Annette Boney, Stuart
4 First and, of course, the other people in Texas who
5 were manufacturing the methaqualudes at the clandestine
6 laboratory on Farrington Street. You heard Agent
7 Clifton testify that he had that place under surveillance
8 for six weeks, and in the course of that time he saw
9 four people go in and out of the laboratory.

10 Now, this is a huge laboratory which you can
11 see for yourselves and Annette Boney was not the only
12 person in Texas involved in this methaqualudes tablets.
13 That's perfectly clear.

14 As I recall Mr. Rothblatt said that there was
15 no evidence that Michael Cantor discussed methaqualudes
16 with Annette Boney or something absurd like that. He
17 said they were talking about sweaters, asking you to
18 infer from the fact that they talked about sweaters that
19 they didn't talk about drugs.

20 Well, let's see what the record shows. Let's
21 get back to the evidence in this case, because it's
22 on the basis of the evidence, not speculation, not
23 surmise, not on the basis of what the lawyers say
24 that you must reach a verdict.

25 This is the testimony of Michael Cantor:

1
2 has a few notations, according to Mr. Cantor, of the
3 trips.

4 Now, Mr. Rothblatt, in a very dramatic way, I
5 must say, said it was shameful, that was his word,
6 "Shameful," that Dr. Franzosa came in here and testified
7 under oath, that in his opinion, these tablets which
8 he made on Farrington Street in Dallas, and these
9 methaqualude tablets which came from a suitcase which
10 Annette Boney sent up to New York were made in the
11 same place.

12 Mr. Rothblatt said that Dr. Franzosa should have
13 had photographs. Why didn't he have photographs?
14 The answer is in the record and it's -- I think it's
15 fairly interesting. What Dr. Franzosa testified to is
16 that a tablet has a considerable amount of depth under
17 a microscope and in order to adequately show two tablets
18 and all of the common characteristics, on two tablets,
19 you have to take as many as 30 photographs, called
20 layers, because the depth of the field of the cameras
21 that he investigated are such that they don't show the
22 whole depth of the tablet, they just show one layer.
23 Dr. Franzosa said -- this is on redirect examination,
24 this is my question:

25 "Dr. Franzosa, on the basis of your experience with

1
2 ballistic microscopes, which have the cameras attached,
3 if Mr. Rothblatt were to get a sample from Government's
4 11 and a sample from Government's 13, could he make
5 photographs ?

6 "Answer: Yes, sir; there would be one major
7 problem. We tried this in the past and found that the
8 optical setup of a ballistic microscope does not have
9 enough depth of field. In fact, one might have to take
10 20 or 30 or more pictures of one pair of tablets to
11 come up with enough photographs to adequately show
12 the comparison that I make with my own eyes in a much
13 shorter period of time."

14 "Then Mr. Rothblatt asked:

15 "Doctor, have you ever attempted to use the
16 sophisticated photographic equipment on the market to
17 photograph tablets?

18 "Answer: Yes, and the results have been inadequate
19 grossly inadequate."

20 Dr. Franzosa goes on to say, "Having talked with
21 some of the manufacturers of this equipment, none of
22 them were able to come up with the lenses that would
23 give me the depth of field I desired."

24 Then Mr. Rothblatt thinks he has him:

25 "Question: What photographic manufacturers did

1
2 you talk to about getting photographs of these tablets?

3 "Answer: Nikon, Leica, American Optical, Bausch
4 and Lombe."

5 And, finally, Dr. Franzosa testified:

6 "I have used the ballistics cameras we have in
7 our laboratory and I have talked to the manufacturers
8 from Nikon, from American Optical, from Bausch and Lombe
9 to ask them if they had equipment that could accomplish
10 my task. Their answer was no."

11 So much for why we did not have photographs
12 and why the opinion of Dr. Franzosa was not gotten in
13 by photographs. It was documented, I submit, by the
14 integrity of the man. You saw him on the stand and
15 his very extensive professional credentials as an
16 expert witness.

17 Now, with respect to Stuart First, Mr. Rosenthal
18 said that Cantor was the only witness against Stuart
19 First. That's not quite so. There were really three
20 witnesses against Stuart First, there was Cantor, of
21 course, there was Jeffrey Oberman, who put him in
22 Cantor's apartment with the heavy suitcases with Annette
23 Boney, and of course, there was Mr. First himself.

24 It's true that Mr. First was at the wrong place
25 at the wrong time, but for the wrong purpose. He was

POST-TRIAL MOTIONS (SUBSTANTIVE COUNT)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-against-

NOTICE OF MOTION

ANNETTE BONEY,

77 CR 47 (S)

Defendant.
-----X

S I R:

PLEASE TAKE NOTICE, that upon the accompanying memorandum of law, dated May 17, 1977, the indictment, and all prior papers and proceedings had herein, the defendant, Annette Boney, will move this Court, before the Honorable Jacob Mishler, United States District Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on May 27, 1977, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order:

(1) Dismissing counts three and four of the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure on the ground that the evidence before the grand jury was insufficient and consisted of hearsay evidence in violation of the Fifth Amendment of the United States Constitution and United States v.

Estepa, 471 F.2d 1132 (2d Cir. 1972);

(2) Granting reargument of defendant's prior motion to dismiss Count Three of the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure, or in the alternative, granting a judgment of acquittal as to said Count pursuant to Rule 29 of the Federal Rules of Criminal Procedure, or in the alternative, arresting judgment as to said Count pursuant to Rule 34 of the Federal Rules of Criminal Procedure, on the ground that this Court is without jurisdiction of the offense charged in said Count in that the offense if any was not committed within this district;

(3) Setting aside the verdict of guilty as to Count Three of the indictment and ordering entry of judgment of acquittal on said Count pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the ground that the evidence was insufficient to sustain a conviction;

(4) Arresting judgment as to Count Three of the indictment pursuant to Rule 34 of the Federal Rules of Criminal Procedure, and dismissing Count Four of the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure, on the ground that the indictment does not state facts sufficient to constitute an offense against the United States, in that it alleges as crimes

certain conduct which was not rendered criminal by Act of Congress,
but rather by administrative rule, in violation of Article I,
Section 1 and the Fifth Amendment of the United States Constitution;

(5) Granting such other and further relief as to this
Court may seem just and proper.

Dated: New York, New York
May 16, 1977

Yours, etc.,

ROTHBLATT, ROTHBLATT, SEIJAS
& PESKIN
Attorneys for Defendant

By JON G. ROTHBLATT
232 West End Avenue
New York, New York 10023
(212) 787-7001

TO: HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

DISCOVERY LETTER OF APRIL 18, 1977

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WASHINGTON, D. C. 20006

1629 K STREET, N. W.

SUITE 520

(202) 223-2820

April 18, 1977

Jonathan M. Marks, Esq.
Assistant U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BY HAND

Re: United States v. Annette Boney
77 CR 47

Dear Mr. Marks:

I write to acknowledge receipt of the discovery material previously provided to the defendant in this case, and to request additional material which we have discussed in the past, but which has not yet been furnished. In view of the proximity of the trial, we request that the additional discovery be completed as soon as possible. We are available at any time for this purpose.

The following material has been received:

(a) Five investigative reports of Special Agent Gerald Graffam dated January 7, 1977 (two reports), January 10, 1977, February 1, 1977 and February 4, 1977.

(b) Two laboratory analysis reports of Roger Godino dated January 6, 1977 and February 4, 1977 relating to Exhibit No. 1, approximately 26,500 tablets seized at Kennedy Airport on December 21, 1976.

Jonathan M. Marks, Esq.
April 18, 1977

Page 2

(c) Copies of five cassette tape recordings, marked Exhibits A, D, E, F & H.

(d) Four reports (DEA Form 7a) concerning the collection of Exhibits A, D, E & F.

(e) Transcripts of Exhibits A, D, E & H.

To the extent not included in the items set forth above, we request discovery and inspection of the following:

1. Any and all statements of the defendant, written, recorded or otherwise, including any such statement embodied in the statement of another person.

2. Any and all documents, tangible objects, photographic film, or other items of physical evidence which (a) were obtained from or belong to the defendant; (b) the government intends to offer into evidence at trial; or (c) are material to the defense.

3. Results and reports of any and all scientific tests, examinations or experiments made in connection with this case, including the name of the test performed, and description of the method and procedure used.

4. The device(s) used to make the tape recordings which the government intends to offer into evidence at trial.

5. The name, current address and telephone number of all witnesses the government intends to call at trial.

6. Any and all statements, written, recorded or otherwise, including any such statement embodied in the statement of another person, of each witness the government intends to call at trial.

7. The criminal record of all witnesses the government intends to call at trial.

8. The name, current address and telephone number of all known witnesses to the events charged in the indictment whom the government does not intend to call at trial.

9. Any and all statements, written, recorded or otherwise, including any such statement embodied in the statement of another person, of each witness described in the preceding paragraph.

10. Any and all agreements, understandings, arrangements, assurances or promises between the government or any other law enforcement agency and any witness the government intends to call at trial, including guilty pleas to less than an entire indictment, recommendation as to length, nature of sentence or place of incarceration, agreement or recommendation not to prosecute the witness or other person.

11. A description of any and all procedures such as line-ups, show-ups or photographic displays used to identify or attempt to identify the defendant, to include the date, time, location, all persons present, and the results thereof.

12. Any other evidence, of whatever form, source, or motive which tends to exculpate the defendant either through an indication of her innocence or through the impeachment of any potential government witness, and all information of whatever form, source or nature which may lead to evidence which tends to exculpate the defendant whether by indicating her innocence or impeaching the credibility of any potential government witness, or any other information which may be or become of benefit to the defendant in preparing or presenting a defense at trial.

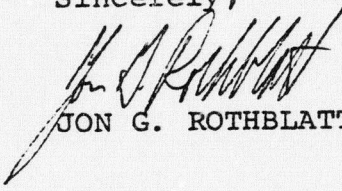
Jonathan M. Marks, Esq.
April 18, 1977

Page 4

With respect to Counts One and Two of the indictment, concerning which no discovery material has yet been furnished, we request the following particulars:

1. The date, time and place the acts are alleged to have been committed.
2. The weight of controlled substance alleged to have been possessed (Count One) and distributed (Count Two).
3. The name and current address of the person(s) to whom the controlled substance was distributed, and whether such person was a government agent or informant at the time.
4. Whether any money changed hands at the time of the distribution alleged in Count Two, and if so, the amount thereof, and whether or not any such money was furnished by the government.

Sincerely,



JON G. ROTHBLATT

JGR/clm

DISCOVERY LETTER OF JULY 22, 1977

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July 22, 1977

Jonathan M. Marks, Esq.
Assistant U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BY HAND

Re: United States v. Annette Boney
77-CR-47 (S)

Dear Mr. Marks:

On behalf of defendant Annette Boney we request the following particulars as to Count Four of the indictment in this case:

1. The name and current address of each co-conspirator known to the government not named in the indictment.

2. The date, time location and manner in which each of the following became a member of the alleged conspiracy:

- (a) Annette Boney
- (b) Stuart First
- (c) Michael Cantor
- (d) any other alleged co-conspirator(s)

Jonathan M. Marks, Esq.
July 22, 1977

Page 2

3. All overt acts in furtherance of the alleged conspiracy concerning which the government intends to offer evidence at trial, to include the date and location thereof.

4. Each overt act Annette Boney is alleged to have personally performed.

5. Each overt act Stuart First is alleged to have personally performed.

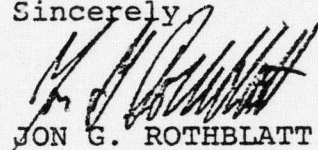
6. Each overt act Michael Cantor is alleged to have personally performed.

7. Each overt act allegedly performed by any other person not named in the indictment, and the name of such other person.

8. Whether any of the overt acts concerning which the government intends to offer evidence at trial constitute the substantive offenses alleged in Counts One, Two and Three of the indictment. If yes, specify which of the substantive offenses are overt acts.

In addition, we renew each of the discovery requests set forth in the letter dated April 18, 1977, previously sent to you in this matter. A copy of the letter is attached and incorporated herein.

Sincerely,



JON G. ROTHBLATT

JGR/clm

cc: Hon. Jacob Mishler
Louis Rosenthal, Esq.

PRE-TRIAL MOTIONS (CONSPIRACY)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

NOTICE OF MOTION

ANNETTE BONEY and STUART FIRST,

77 CR 47 (S)

Defendants.
-----X

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Jon G. Rothblatt, sworn to on July 25, 1977, and all prior papers and proceedings had herein, defendant ANNETTE BONEY will move this Court, before the Honorable Jacob Mishler, United States District Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on August 1, 1977, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order:

(1) Pursuant to the Speedy Trial Act of 1974 (18 U.S.C. § 3161, et seq.), the Transitional Plan for Prompt Disposition of Criminal Cases of the United States District Court for the Eastern District of New York (effective July 1, 1976), and Rule 48(b) of the Federal Rules of Criminal Procedure, dismissing

Count Four of the superseding indictment on the ground that it was not filed within the specified period;

(2) Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, dismissing Count Four of the superseding indictment on the ground that trial of said count is barred under the Double Jeopardy Clause of the Fifth Amendment;

(3) Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, precluding the government from introducing any evidence at trial concerning the offenses charged in Counts One and Two of the original indictment, on the ground that such evidence is barred under the Double Jeopardy Clause of the Fifth Amendment and the principle of collateral estoppel;

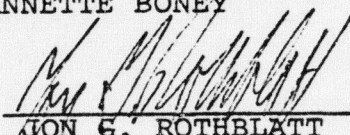
(4) Pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, directing the government to file a bill of particulars with respect to Count Four of the superseding indictment;

(5) Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 25, 1977

Yours, etc.,

ROTHBLATT, ROTHBLATT,
SEIJAS & PESKIN
Attorneys for Defendant
ANNETTE BONEY

By 
JON G. ROTHBLATT
232 West End Avenue
New York, New York 10023
(212) 787-7001

TO: HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

LOUIS ROSENTHAL, ESQ.
16 Court Street
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

ANNETTE BONEY and STUART FIRST,

Defendants.

AFFIDAVIT, POINTS
AND AUTHORITIES IN
IN SUPPORT OF PRE-
TRIAL MOTIONS

77-CR-47 (S)

-----X
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JON G. ROTHBLATT, being duly sworn, deposes and says:

I am with the firm of ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN, attorneys for defendant ANNETTE BONEY. This affidavit is submitted in support of the within motion for various forms of relief. Unless otherwise indicated, factual statements herein are upon information and belief, the principal source thereof being the record in this case.

(1) Dismissal for Violation of Speedy Trial Act and Plan

Pursuant to the Speedy Trial Act of 1974 (18 U.S.C. § 3161, et seq.) and the Transitional Plan for Prompt Disposition

of Criminal Cases of the United States District Court for the Eastern District of New York ("Transitional Plan"), the indictment in this case had to be filed within 60 days of the defendant's arrest. 18 U.S.C. § 3161(b)(f); Transitional Plan, § 3(a)(1).^{*} The defendant was in fact arrested January 10, 1977, and the original indictment, consisting of three substantive counts, was filed on January 27, well within the 60-day period.

However, on the morning trial was to begin, May 2, 1977, the government re-presented the case to a grand jury and obtained a superseding indictment charging the three original substantive offenses, plus a new conspiracy count naming an additional defendant (Stuart First) and an unindicted co-conspirator (Michael Cantor). This was 112 days after defendant's arrest; almost twice the permissible period.^{**}

^{*} As of July 1, 1977, this period is 45 days.

^{**} It is clear that the time within which a superseding indictment must be filed on a subsequent charge (such as the conspiracy charge here) relates back to the date of the defendant's arrest. See Transitional Plan, § 5(d)(2), (5). If it were otherwise, the government could effectively insulate itself from the time limitations of the Speedy Trial Act by merely obtaining a superseding indictment. Cf. Transitional Plan, § 6A.

As noted by Judge Weinstein, the Speedy Trial Act "requires a court to dismiss an indictment after a defendant fails to be indicted or tried within the time set by the Act. But the dismissal may be either with or without prejudice. . . ." United States v. Salzman, 417 F.Supp. 1139, 1151 (E.D.N.Y. 1976). See 18 U.S.C. § 3162(a)(1).

The Transitional Plan provides that failure to comply with this time limitation "shall not require dismissal of the prosecution", but makes specific reference to the court's power to do so pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure. Transitional Plan, § 10(e).

Thus, in the present case, the government's failure to obtain an indictment on the conspiracy charge within 60 days of defendant's arrest requires dismissal of Count Four of the indictment. It is within the Court's discretion as to whether the dismissal is to be with or without prejudice. Since the defendant already stands convicted of a felony, and in light of the double jeopardy considerations discussed below, it is submitted that the indictment should be dismissed with prejudice.

(2) Dismissal on the Ground of Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecution or multiple punishments for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Here the government seeks to prosecute the defendant on a conspiracy charge after she has been tried on three substantive counts arising out of the same facts. While the elements of the offenses may be different, the evidence is not. As government counsel has already conceded, the conspiracy count "doesn't change the proof one bit." (Tr. May 2, 1977, at 4).

Under these circumstances, a second prosecution would clearly be barred under the "same transaction" test, which requires the government "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Ashe v. Swenson, 397 U.S. 436, 453-454 (1970) (Brennan, J., concurring); Brown v. Ohio, 21 Cr.L. 3137, 3139 (U.S. June 16, 1977) (Brennan, J., concurring). See also, United States v. Cioffi, 487 F.2d 492, 496-498 (2d Cir. 1973) (Friendly, J.); Note, 71 Col. L.Rev. 321, 330-331 (1971).

Further, as recently observed by Judge Lumbard:

. . . it has been suggested that particularly unfair bifurcations of prosecutions should be prohibited under the double jeopardy clause, or under the supervisory power of the federal courts. See United States v. Mallah, 503 F.2d 971, 985 n.7 (2d Cir. 1974); United States v. Cioffi, 487 F.2d 492, 496 & n. 4 (2d Cir. 1973). For example, it would be highly questionable to prosecute a conspiracy charge in addition to, and separately from, any substantive offense committed as part of the conspiracy. See Marakar v. United States, 370 U.S. 723, 82 S.Ct. 1573, 8 L.Ed.2d 803 (1962); Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960).

United States v. Jacobson, 547 F.2d 21, 23 (2d Cir. 1976), cert. denied, 97 S.Ct. 1581 (1977).

Here, this "highly questionable" practice is the direct result of the government's laxity in failing to initially charge the defendant with conspiracy. Under these circumstances, a second prosecution should not be permitted.

(3) Collateral Estoppel

The doctrine of collateral estoppel, now embodied in the Double Jeopardy Clause of the Fifth Amendment, prohibits the government from relitigating issues of ultimate fact which have

been previously determined in the defendant's favor in a prior proceeding. Ashe v. Swenson, 397 U.S. 436 (1970). In the context of a conspiracy prosecution, the government would be collaterally estopped from relitigating any overt acts that were necessarily decided against it in a prior trial of the substantive offenses. See, e.g., United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943). See also United States v. Seijo, 537 F.2d 694 (2d Cir. 1976).

Applied to the present case, defendant's acquittal on Counts One and Two at the first trial precludes the government from offering any evidence concerning the alleged possession or distribution of 60,000 Methaqualone tablets on or about November 17, 1976.

(4) Bill of Particulars

The defendant requests an order directing the government to file a bill of particulars setting forth the following:*

1. The name and current address of each co-conspirator known to the government not named in the indictment.

* The above particulars were requested of the government in a telephone discussion on July 21, and by letter hand delivered on July 22. As yet the government has neither agreed nor declined to furnish the requested particulars.

2. The date, time location and manner in which each of the following became a member of the alleged conspiracy:

- (a) Annette Boney
- (b) Stuart First
- (c) Michael J Cantor
- (d) any other alleged co-conspirator(s)

3. All overt acts in furtherance of the alleged conspiracy concerning which the government intends to offer evidence at trial, to include the date and location thereof.

4. Each overt act Annette Boney is alleged to have personally performed.

5. Each overt act Stuart First is alleged to have personally performed.

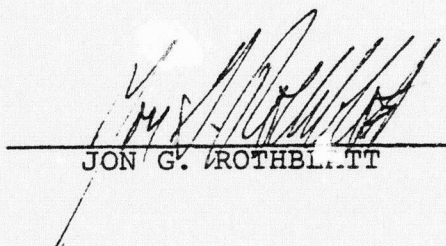
6. Each overt act Michael Cantor is alleged to have personally performed.

7. Each overt act allegedly performed by any other person not named in the indictment, and the name of such other person.

8. Whether any of the overt acts concerning which the government intends to offer evidence at trial constitute the substantive offenses alleged in Counts One, Two and Three of the indictment. If yes, specify which of the substantive offenses are overt acts.

It is clearly within the court's discretion to direct the government to furnish the above particulars. See, e.g., United States v. Agnello, 367 F.Supp. 444 (E.D.N.Y. 1973); United States v. Dioguardi, 332 F.Supp. 7 (S.D.N.Y. 1971); United States v. Tanner, 279 F.Supp. 457 (N.D.Ill. 1967); United States v. Crisona, 271 F.Supp. 150 (S.D.N.Y. 1967); United States v. Pilnick, 267 F.Supp. 791 (S.D.N.Y. 1967); United States v. Roberts, 264 F.Supp. 622 (S.D.N.Y. 1966); United States v. Baker, 262 F.Supp. 657 (D.C.D.C. 1967). They are especially necessary here in view of the double jeopardy and collateral estoppel issues that must be resolved prior to trial.

WHEREFORE, it is respectfully requested that Count Four of the indictment be dismissed with prejudice, or alternatively, that the other relief requested herein be in all respects granted.



JON G. ROTHBLATT

Sworn to before me this
day of July, 1977



Notary Public

MELANIE J. MARTIN
Notary Public State of New York
No. 31-4512822
Qualified in New York County
Commission Expires March 30, 1979

United States of America vs.

United States District Court for

Eastern District of N.Y.

DEFENDANT

ANNETTE BONEY

DOCKET NO.

77 CR 47 (S)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH 8 DAY 18 YEAR 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Henry Rothblatt

(Name of counsel)

FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE, S. DISTRICT COURT E.D.N.Y.

AUG 18 1977

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY in count 3

TIME A.M. _____
P.M. _____

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.Code, Sec. 841(a)(1) in that on or about Dec. 21, 1976, the defendant, did knowingly and intentionally possess with intent to distribute approximately 20 grams of Methaqualine, a Schedule II narcotic controlled substance

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of _____

SENTENCE
OR
PROBATION
ORDER

Defendant is sentenced on count 3 to examination and report pursuant to T-18, U.S.Code, Sec. 5010(e).
Execution of sentence stayed pending appeal.

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the A.

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general and recommends,

It is ordered that the Clerk deliver

United States of America
DEFENDANT
ANNETTE BONEY
EASTERN DISTRICT OF NEW YORK
U.S. DISTRICT COURT
FILED
SEP 27 1977
77 CR 47(S)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date
MONTH DAY YEAR
SEPT. 29 1977

COUNSEL
☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒ WITH COUNSEL HENRY ROTHBLATT
(Name of counsel)

PLEA
☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT
There being a finding/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY. on Count 4.

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S. Code Sec. 846 in that on or about and between October 22, 1976 and January 10, 1977, the deft with another did knowingly and intentionally combine, conspire, confederate and agree together with another to possess with intent to distribute and to distribute approximately 129,300 tablets of methaqualone, a Schedule II controlled substance.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Deft sentenced to examination and report pursuant to 18 U. S. Code 4205(c).

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION
In addition to the special conditions of probation imposed above, the court hereby orders that the defendant shall comply with the conditions of probation set out on the reverse side of this judgment. The Court reserves the right to modify, suspend, or revoke the probation, and at any time during the probation period or within a reasonable time thereafter, to suspend, modify, or revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and his representative.

COURT REPORTER
131a
It is ordered that the Clerk deliver a copy of this judgment to the U.S. Marshal for the Eastern District of New York.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

RICHARD WITHERS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1526 Webster Ave. Apt. B-3
Bronx, NY 10457.

That on the 28 day of NOVEMBER, 1977,
deponent personally served the within APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving _____ true copies of same with a duly
authorized person at their designated office.~~

By depositing 1 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

DAVID G. TRAGER
United States Attorney
Attorney for Appellee
225 Cadman Plaza East
Brooklyn, New York 11201

Richard Withers

Sworn to before me this

28th day of November, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

